IN THE

Supreme Court of the United States

OCTOBER TERM, 1945

No. 305

TOWNSHIP OF HILLSBOROUGH, SOMERSET COUNTY, N. J. and CHRISTOPHER G. HORNER, Collector of Taxes of the Township of Hillsborough,

Petitioners,

vs.

DORIS DUKE CROMWELL, individually and as Trustee of the Duke Endowment,

Respondent.

BRIEF FOR RESPONDENT

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December 7, 1945

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IN THE

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TOWNSHIP OF HILLSBOROUGH, SOMERSET COUNTY, N. J., and CHRISTOPHER G. HORNER, Collector of Taxes of the Township of Hillsborough, *Petitioners,* *vs.* DORIS DUKE CROMWELL, individually and as Trustee of the Duke Endowment, *Respondent.*	No. 305

BRIEF FOR RESPONDENT

This is a review, on writ of certiorari, of a judgment of the United States Circuit Court of Appeals for the Third Judicial Circuit (R. 155), affirming a declaratory judgment of the United States District Court for the District of New Jersey (R. 114), which adjudged that assessments of personal property taxes against respondent, individually and as trustee of the Duke Endowment, for the tax years 1940 and 1941 were wholly null and void.

OPINIONS BELOW

The opinion of the Circuit Court of Appeals (R. 148) is reported in 149 F. (2d) 617; and the opinion of the

District Court (R. 111) is reported in 56 F. Supp. 41. An earlier opinion of the United States District Court denying a motion to dismiss the action will be found at R. 74.

JURISDICTION

In the petition for certiorari the jurisdiction of this Court was invoked under Section 347 of Title 28 of the United States Code (Section 240 of the Judicial Code as amended). In their brief on the merits, petitioners rest the jurisdiction of this Court on Section 344(b) of Title 28 of the United States Code (Section 237(b) of the Judicial Code as amended).

STATEMENT

This is an action brought by respondent under the Declaratory Judgments Act (Sec. 274(d) of the Judicial Code, 28 USC 400) to have declared null and void certain assessments on intangible personal property entered for the years 1940 and 1941 by the Collector of Hillsborough Township, Somerset County, New Jersey, against her both individually and as trustee of the Duke Endowment, calling for tax payments of nearly $7,000,000 for each year, as compared with the Township's total budget of something under $97,000 per year.

The system of tentative listing of property for assessment and of assessment of personal property taxes, as prescribed by the Revised Statutes of the State of New Jersey, which is referred to repeatedly in this statement of facts as well as in the argument, is as follows:*

*The full text of all sections of the Revised Statutes of New Jersey cited in this brief appear in the Appendix.

Property is assessed for each year with reference to the amount owned on October first of the previous year (R.S.N.J. 54:4-1, 12, 23 and 24). Each taxing district, by its agent for that purpose, the "assessor", prepares a list of taxable property (commonly referred to in New Jersey as "ratables"), and is required to complete the list by the January 10th following and on that date to file with the County Board of Taxation of the county in which the taxing district is located the complete list, together with a copy thereof known as the "Assessor's Duplicate", for examination, revision and correction by the Board (R.S.N.J. 54:4-35). The County Board receives the lists and duplicates from the several taxing districts and is required "after investigation" to "revise, correct and equalize the assessed value of all property in the respective taxing districts, increase or decrease the assessed value of any property not truly valued, add to the lists and duplicates any property which has been omitted or overlooked at its true value, and in general do everything necessary for the taxation of all property in the county equally and at its true value" (R.S.N.J. 54:4-46, 47). The County Board is further required "on or before April first in each year" to "cause the corrected, revised and completed duplicates, certified by it to be a true record of the taxes assessed, to be delivered to the collectors of the various taxing districts in the county, and the tax lists shall remain in the office of the board as a public record" (R.S.N.J. 54:4-55).

As will appear from the ensuing argument (Point II) this delivery "on or before April first in each year", as prescribed in Section 54:4-55, constitutes the making of the assessment; and, within the meaning of Section 54:3-20, about to be quoted, prior to such delivery on April 1 an

omission of any property is classified as an omission "by the assessor", covered by the first two sentences of the section; whereas after such delivery on April 1, the omission is classified as an omission "in the assessment", covered by the third sentence of the section.

R.S.N.J. 54:3-20 is entitled "Assessment of omitted property". This section had its origin in Pamphlet Laws 1848, page 230, which had enacted different procedures for property "omitted by the assessor" and property "omitted in the assessment", in separate and distinct sections, which were combined in the present form by the General Tax Revision of 1903, P.L. 1903, page 412, sec. 28, from which, by later revisions, there came the present R.S.N.J. 54:3-20. The first two sentences of Section 54:3-20, which were derived from the first section of the original 1848 statute, read as follows:

> "The county board of taxation shall, by resolution, cause to be entered upon the tax duplicate a proper assessment against any property omitted by the assessor. The board shall then give immediate notice of such entry and of the time and place of its next meeting to the owner of the property affected, and furnish a copy of the entry to the clerk or collector of the taxing district, who shall enter it on his tax list."

The third sentence, which was derived from the second section of the 1848 statute, provides:

> "On the written complaint of the collector, or any taxpayer of the taxing district or of the governing body thereof, that property specified has been omitted in the assessment, the county board, on five days' notice in writing to the owner by the party complaining, and after due examination and hearing,

> may enter the omitted property on the duplicate by judgment rendered within ten days after the hearing, a transcript whereof shall be furnished by the board to the collector, who shall amend his duplicate accordingly. * * *"

On June 26, 1941, and so after April 1 of each of the tax years involved, 1940 and 1941, and after the assessments for those years had been made, the Somerset County Board of Taxation adopted four resolutions, which were in substance identical. Each recited a written application made "by Christopher G. Horner, a resident and taxpayer of the taxing district of the Township of Hillsborough in the County of Somerset and the duly authorized Collector of Taxes for said Township", whereby it appeared that "certain intangible personal property owned by" respondent was taxable in the taxing district and was "entirely omitted from assessment" by the Township. Each resolution purported to adjudge and determine that respondent was on October 1 of the year prior to the tax year in question a resident and inhabitant of Hillsborough Township and that taxable and intangible property in the amount stated was on such October first "entirely omitted by the Assessor of Hillsborough Township from the assessment of property in said Township" for such tax year; that the omitted property in the stated amount "be and the same is hereby assessed against" respondent, and "is hereby ordered to be entered on the tax duplicate of Hillsborough Township" for such tax year. It was further resolved that "immediate notice of the entry of this assessment" be given to respondent by the mailing of the resolution "together with a notice of the time and place of the next regular meeting of this Board" to be held on July 14, 1941; and that a certified copy of the resolu-

tion be furnished to the Collector of Taxes of Hillsborough Township "with direction that he enter upon the tax duplicate of said Township the said amount hereby assessed" (Exs. 2, 3, 5 and 6 annexed to Complaint, R. 37-48, and Pars. 18-22 of Complaint, R. 15-18, admitted in like-numbered paragraphs of Answer, R. 53-54).

On the following day, June 27, 1941, the secretary of the Somerset County Board of Taxation sent two letters to respondent, one addressed to her individually and enclosing copies of the resolutions Exhibits 2 and 3 above referred to, and the other addressed to her as Trustee of the Duke Endowment, enclosing copies of the resolutions, Exhibits 5 and 6 (Exs. 1 and 4 to Complaint, R. 36, 42, and Pars. 18-20 of Complaint, R. 15-16, admitted in like-numbered paragraphs of Answer, R. 53).

Also pursuant to the resolutions and assessments thereby made and directed, petitioner Horner, as Collector of Hillsborough Township, wrote to respondent on June 30, 1941 two letters in identical form, one addressed to her individually and the other to her as Trustee of the Duke Endowment, reading as follows:

> "Enclosed please find tax bills for personal property taxes in accordance with assessment determined and fixed by the Somerset County Board of Taxation for the taxing years of 1940 and 1941.
>
> "Please take notice that interest and penalty at the rate of 6% per annum are running from the date of this bill.
>
> "Please take further notice that this letter is a formal demand for payment of the within bill forthwith and unless payment is received accordingly, I will be obliged to proceed pursuant to law."

The tax bills referred to in and enclosed with these letters are Exhibits 7-14 attached to the complaint, R. 48-49, 129-

136 (Complaint, Pars. 24, 25, R. 18-21, admitted in like-numbered paragraphs of Answer, R. 54).

The total amount of taxes required to be raised by the Township of Hillsborough, for State, County and Township purposes, was $96,775.20 for 1940 and $96,726.44 for 1941. Apart from the additional assessments against respondent here in question, the net assessed valuation for taxation of all property assessed, both real and personal, in the Township, amounted to $3,117,863 for 1940 and $3,139,020 for 1941, resulting in a tax rate of 3.12% for 1940 and 3.10% for 1941. (Complaint, Pars. 35, 36, R. 29-30, admitted by like-numbered paragraphs of Answer, R. 60). The attempted additional assessments against respondent embodied in the resolutions and tax bills above referred to would have increased the valuation of the Township tax ratables by $221,940,438 for each of the tax years 1940 and 1941, but would not have affected the above tax rates, because under the law they had already been irrevocably fixed on April 1 of each year*. The taxes purported to be levied against respondent aggregated $6,924,541.65 for 1940 and $6,880,153.57 for 1941, computed at the above tax rates of 3.12% and 3.10%. The above is graphically shown by the following table:

	Taxing Year 1940	Taxing Year 1941
Township Ratables	$ 3,117,863.00	$ 3,139,020.00
Additional Assessment against Respondent individually and as Trustee	221,940,438.00	221,940,438.00
Township Budget	96,775.20	96,726.44
Additional Taxes levied against Respondent individually and as Trustee on above assessments	6,924,541.65	6,880,153.57

*_Musconetcong Iron Works_ v. _Borough of Netcong_, 90 N. J. L. 58, 99 Atl. 914 (Sup. Ct. 1917).

Respondent commenced the instant action for declaratory judgment on July 14, 1941 (R. 1). The relief asked (R. 35) was a judgment declaring that the purported assessments were wholly invalid and void, in contravention of the due process and equal protection clauses of the Fourteenth Amendment to the Constitution of the United States and also in contravention of the provisions of the applicable statutes of New Jersey.

The two Federal grounds alleged were: (1) that respondent was a non-resident of New Jersey and the situs of the common law trust known as the Duke Endowment, of which respondent was only one of a board of fifteen trustees, was outside of New Jersey (Complaint, Pars. 30-33, R. 24-28); and (2) that the taxing authorities of the Township of Hillsborough and of the other taxing districts of the County and State had consistently, systematically, intentionally and notoriously failed to assess at true value, or at all, any intangible personal property owned by any other taxpayers, but had deliberately singled out respondent to impose upon her a discriminatory burden of taxation grossly disproportionate to the taxes imposed upon other taxpayers, for which discrimination she was without remedy under the laws and decisions of New Jersey (Complaint, Par. 41, R. 32-33).

The State ground alleged was that there was total lack of compliance by petitioners with the requirements of the third sentence of Section 54:3-20 of the New Jersey Revised Statutes relating to the addition of property "omitted in the assessment", in that the five days' notice to the owner and the due examination and hearing stated therein as a pre-requisite to the entry of the omitted property on the duplicate were not given (Complaint, Pars. 28, 29, R. 23).

Denials in the answer of the paragraphs of the complaint stating the two Federal grounds raised issues of fact. The State ground, on the other hand, raised questions of law only, since the facts appear on the face of the papers admitted by the answer; the purported denials in Paragraphs 28 and 29 of the answer (R. 55-56) contain no denials of any factual matter but merely argue that the first two sentences of R.S.N.J. 54:3-20, set forth above, govern this proceeding.

Upon the filing of the answer in September 1941, respondent proceeded with diligence to give notice of the taking of depositions and to take depositions on the issues of fact pertaining to the Federal grounds (R. 2-4, 124-125). On the issue of intentional discrimination due to a systematic practice of not assessing other taxpayers on intangible personal property, respondent took the depositions of petitioner Horner, Collector of Taxes of Hillsborough Township; of Charles V. N. Davis, the Assessor of Hillsborough Township; of William Lifgren, W. W. Davenport, Jr., and Angelo Soriano, the members of the Somerset County Board of Taxation who adopted the resolutions; of Edward Lindstrom and J. Irving Stryker, a majority of the members of the Township Committee of Hillsborough Township; of Everest L. Belli, a former member and President of the County Board; of assessors of every taxing district in Somerset County; and of two former assessors of such a taxing district (Affidavit of Shelton Pitney, Par. 16, first paragraph, R. 105-106*).

*The affidavit of Mr. Pitney is uncontroverted. Petitioners contend that it does not conform to Rule 56(e) of the Rules of Civil Procedure that affidavits shall be made on personal knowledge and shall set forth such facts as would be admissible in evidence and show affirmatively that affiant is competent to tes-

Before the instant case was brought to trial the case of *Duke Power Co.* v. *State Board of Tax Appeals* was decided by the Supreme Court of New Jersey in favor of the Duke Power Company on February 10, 1943 (129 N. J. L. 449, 30 A. (2d) 416), and on March 9, 1944 that decision of the Supreme Court was affirmed *per curiam* by the Court of Errors and Appeals, the highest court of New Jersey, "for the reasons expressed in the opinion delivered by Mr. Justice Bodine in the Supreme Court" (131 N. J. L. 275, 36 A. (2d) 201). The facts of the *Duke Power Company* case were as follows:

On August 16, 1939, the Township of Hillsborough, acting by petitioner Horner as Collector, filed with the Somerset County Board of Taxation its written complaint, of which it gave the Power Company the five days' notice in writing required by the third sentence of R.S.N.J. 54:3-20, alleging that some cash and other intangible property belonging to the Power Company on October 1, 1938 had been wholly omitted in the assessment for the taxing year 1939 and demanded that the Board enter that property for assessment for the taxing year. On the motion of the Power Company the Board struck from the complaint for insufficient description all property items except the

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tify to the matters stated therein. The Circuit Court of Appeals held (R. 155) that "portions" of the affidavit do not conform to the rule. We have in this brief, as we did below, limited our references to the affidavit to the portions which do conform. Mr. Pitney, as the member of the firm of Pitney, Hardin & Ward who has been from the inception of this action in charge thereof and thoroughly familiar with its facts, pleadings and proceedings (R. 85), is clearly competent to give evidence that these depositions were taken. We do not rely upon the contents of the depositions or upon any reference to those contents found in that affidavit.

cash. The Board heard the cash item on November 13, 1940 and on November 18, 1940 adopted a resolution whereby the cash was entered for assessment by the Township. Four days later, on November 22, 1940, on another application (described by Mr. Justice Bodine as a "complaint", 129 N. J. L., p. 455, 30 A. (2d), p. 419) by Collector Horner, without any notice to the company, the County Board adopted a resolution amending the previous assessment for the cash so as to include various other categories of intangibles and so bring up the total assessment for the taxing year 1939 to the sum of $21,953,125. This resolution also provided that a certified copy be given the Collector of the Township and that a like copy be sent to the Power Company with immediate notice of the entry of the amended assessment and of the time and place of the next meeting of the County Board on Monday, December 2, 1940; all of which was accordingly done.

From this it will be seen that the procedure adopted by the taxing authorities with respect to the amended assessment of $21,953,125 on November 22, 1940 was identical with the procedure pursued with respect to the attempted assessments against respondent in the instant case and that the two cases are on all fours on the State ground of noncompliance by the taxing authorities with the requirements of the New Jersey statutes (see, also, affidavit of Shelton Pitney, Pars. 11, 12; R. 95, 101*). Petitioners do not in their brief point to any material difference between the pro-

*Mr. Pitney is a competent witness with respect to the proceedings in the *Duke Power Co.* case. His firm, Pitney, Hardin & Ward, was counsel for the Duke Power Company from the inception of that litigation and Mr. Pitney was throughout the member of the firm in active charge of the litigation and was familiar with the facts, pleadings, issues and decisions (R. 95).

cedure used in the instant case and that used in the *Duke Power Company* case. In fact, petitioners in their petition for certiorari (p. 13) state that the *Duke Power Company* case was "under facts almost identical with facts herewith presented".

The *Duke Power Company* case held that the procedure under the first two sentences of R.S.N.J. 54:3-20 applies only in the period from January 10 to April 1 of each year during which the county boards, under R.S.N.J. 54:4-35 to R.S.N.J. 54:4-55, revise, correct and equalize tax lists filed by the several taxing districts of the county, and that after April 1 property overlooked and not listed by the taxing district and not added by the County Board during the period from January 10 to April 1 is property omitted "in the assessment", and may be assessed only in the manner prescribed by the third sentence of R.S.N.J. 54:3-20.

The case further held that an assessment improperly made after April 1 by County Board action under the first two sentences cannot be corrected under the so-called remedial statutes referred to in petitioners' brief (R.S.N.J. 54:4-58 and R.S.N.J. 54:4-59), because those statutes do not apply where the procedure prescribed by the third sentence of R.S.N.J. 54:3-20 for assessment of property "omitted in the assessment" has not been followed.

Upon the authority of the *Duke Power Company* case respondent, on March 14, 1944, made a motion for summary judgment on the ground of non-compliance with the third sentence of Section 54:3-20. Petitioners, on March 31, 1944, made a cross motion to dismiss the complaint on the grounds (1) that the alleged cause of action in the complaint is not within the jurisdiction of the United States District Court, (2) that the Court in appropriate exercise

of its discretion should not entertain the jurisdiction and (3) that respondent has a plain, adequate and complete remedy in the administrative bodies and in the courts of New Jersey (R. 109-110). District Judge Fake disposed of both motions in an opinion (R. 111-113) upon which judgment was entered on August 7, 1944, denying petitioners' motion to dismiss and granting respondent's motion for summary judgment on the State ground (R. 114-116). It was accordingly not necessary to try or adjudicate the Federal grounds stated in the complaint.

The judgment of District Judge Fake was unanimously affirmed by the Circuit Court of Appeals in an opinion by Circuit Judge Goodrich, filed May 9, 1945, on which judgment was entered the same day. That is the judgment now under review.

QUESTIONS PRESENTED

1. Did the District Court have jurisdiction to entertain this action because of the substantial Federal question relating to discrimination and the absence of an adequate remedy in the courts of New Jersey? And was its granting of relief on the State ground, after the law of New Jersey thereon had been established by the *Duke Power Company* case, a sound exercise of that jurisdiction?

2. Did the District Court in granting a summary judgment on the State ground correctly construe and apply the law of New Jersey as enunciated by its highest courts in the *Duke Power Company* case?

SUMMARY OF ARGUMENT

The District Court had jurisdiction of this action by reason of the presentation in the complaint of a substantial Federal question. It was alleged that the assessing and taxing authorities of New Jersey have consistently, systematically, intentionally and notoriously failed to assess at true value, or at all, the intangible personal property owned by taxpayers generally and have deliberately singled out respondent for taxation on such property, thus laying upon her a discriminatory burden. That such discrimination is a violation of the equal protection clause of the Fourteenth Amendment to the United States Constitution is established by a long line of decisions of this Court.

The jurisdiction was not affected either by the amendment of August 21, 1937 to the Johnson Act, or by the equitable rule followed by this Court in *Great Lakes Dredge & Dock Co.* v. *Huffman*, 319 U. S. 293 (1943), because there was no adequate remedy in the administrative agencies or courts of New Jersey for relief from such unconstitutional discrimination. Under New Jersey law one discriminatorily taxed upon the full value of his property, by reason of intentional and systematic undervaluation by State officials of taxable property belonging to other owners, has no right to have his assessment reduced to a parity with those of such others; and he is not even permitted to introduce evidence of the discrimination before the administrative agencies or courts. The only remedy accorded to the taxpayer discriminated against by the tax statutes of New Jersey and the decisions construing them is to apply to the administrative agencies to have the assessments on the undervalued property of such other owners raised.

That so-called remedy has been held by this Court in a long line of decisions to be no remedy at all for the invasion of the complaining taxpayer's right under the Fourteenth Amendment. But the New Jersey courts have expressly declined to follow these decisions of this Court.

At the time the complaint herein was filed, the law of New Jersey was not clear on the State ground presented in the complaint, that the purported additional assessments against respondent were null and void under Section 54:3-20 of the Revised Statutes of New Jersey. No New Jersey case had expressly held that the procedure provided by the first two sentences of that section relating to property omitted "by the assessor" was not applicable to an attempt after April 1 of the tax year to assess property omitted "in the assessment" without compliance with the requirements of the third sentence thereof of five days' prior notice to the taxpayer and due examination and hearing. And the State law as to whether, even if in such case the procedure prescribed in the third sentence of Section 54:3-20 was exclusive, the failure to follow it could be disregarded in view of the so-called remedial statutes (R.S. N.J., Sections 54:4-58 and 54:4-59) was not clear.

During the pendency of the action all of these questions of State law were authoritatively resolved by the decisions of the New Jersey Supreme Court and Court of Errors and Appeals in the case of *Duke Power Company* v. *State Board of Tax Appeals*, 129 N.J.L. 449, 30 A. (2d) 416 (Feb. 10, 1943); 131 N.J.L. 275, 36 A. (2d) 201 (March 9, 1944). That case held comprehensively, on an indistinguishable state of facts, that, in the case of an assessment after April 1, proceedings in accordance with the first two sentences of Section 54:3-20 were unauthorized; that the failure to give

notice and accord a hearing thereon prior to the making of the assessment made the imposition of the tax null and void; and that the assessments were not saved from nullity by the remedial statutes.

The decision of the Court of Errors and Appeals of New Jersey in the *Duke Power Company* case, affirming the decision of the Supreme Court "for the reasons expressed in the opinion delivered by Mr. Justice Bodine" therein was conclusive evidence of the law of New Jersey on the State questions presented in the complaint herein. The opinion of Mr. Justice Bodine dealt comprehensively with all of the questions here involved concerning the interpretation of Section 54:3-20 and the relation of that section to the other pertinent sections of the Revised Statutes dealing with the New Jersey system of assessment of personal property taxes, as well as with the proper scope of application of the so-called remedial statutes. This holding of the New Jersey courts on these questions cannot, as petitioners contend, be classified as dictum. It was one of two grounds, on both of which the decisions were expressly based. Thus, according to rules clearly established in the decisions of this Court, neither ground is dictum, obiter or judicial, but each is a decision of equal validity with the other.

The decisions of the courts below granting relief to respondent upon the State ground, and thus avoiding decision on the Federal ground, was an exercise of jurisdiction which was in accordance with a long line of decisions of this Court, and consonant with the course contemplated by its latest pertinent decision in *Spector Motor Service Inc.* v. *McLaughlin*, 323 U. S. 101 (1944).

ARGUMENT

POINT I.

THE DISTRICT COURT HAD JURISDICTION TO ENTERTAIN THIS ACTION BECAUSE OF THE SUBSTANTIAL FEDERAL QUESTION RELATING TO DISCRIMINATION AND THE ABSENCE OF AN ADEQUATE REMEDY IN THE COURTS OF NEW JERSEY. THE GRANTING OF RELIEF ON THE STATE GROUND, AFTER THE LAW OF NEW JERSEY THEREON HAD BEEN ESTABLISHED BY THE CASE OF DUKE POWER COMPANY v. STATE BOARD OF TAX APPEALS, WAS A SOUND EXERCISE OF THAT JURISDICTION.

Petitioners base their case, as they did their petition for certiorari, primarily upon their conception of this Court's decision in *Great Lakes Dredge & Dock Co.* v. *Huffman*, 319 U. S. 293 (1943). That case, however, is not in point. Nor did it make new law. The action was dismissed upon well-established equitable grounds (see *Matthews* v. *Rodgers*, 284 U.S. 521, 525-8 (1932), and cases therein cited), because the State of Louisiana furnished an adequate remedy for all tax claims under a procedure whereby the taxpayer was fully protected during the pendency of his action. In the instant case respondent, far from having in New Jersey such an adequate remedy, faced, to say the least, as we shall show in Subdivision (B) of this point, as great an "uncertainty surrounding the adequacy" of the remedy as caused this Court in the later case of *Spector Motor Service, Inc.* v. *McLaughlin*, 323 U. S. 101 (1944), to order the District Court to retain jurisdiction.

It is the *Spector* case which, both in its decision and the necessary implications of its opinion, governs the question

of jurisdiction herein. In that case a declaratory judgment action was brought in the Federal court to test the validity of the imposition by Connecticut upon the petitioner, a foreign corporation, engaged exclusively in an interstate trucking business, of a tax or excise upon its franchise for the privilege of carrying on business within the State. There as here, both State and Federal grounds were urged for equitable relief, the petitioner claiming both that the taxing statute should not be construed to apply to it and that, if it were so construed, the tax would offend the Constitution of the United States. This Court found (p. 106) that there was "uncertainty surrounding the adequacy of the Connecticut remedy" with respect to the Federal grounds, and also (p. 104) that the courts of Connecticut had not yet spoken authoritatively on the construction of the taxing act. Stressing the importance of avoiding the decision of the difficult questions presented under the Commerce Clause of the United States Constitution except as a last resort, this Court directed that the District Court retain the bill pending the determination of a declaratory judgment action, as to the applicability of the statute to the petitioner, to be brought promptly in the courts of Connecticut. This Court said (pp. 104-105):

> "We would not be called upon to decide any of these questions of constitutionality, with their varying degrees of difficulty, if, as the District Court held, the statute does not at all apply to one, like petitioner, not authorized to do intrastate business. Nor do they emerge until all other local Connecticut issues are decided against the petitioner. * * *
>
> "Answers to all these questions must precede consideration of the Commerce Clause. To none have we an authoritative answer. Nor can we give

one. Only the Supreme Court of Errors of Connecticut can give such an answer. But this tax has not yet been considered or construed by the Connecticut courts. We have no authoritative pronouncements to guide us as to its nature and application. * * *

"If there is one doctrine more deeply rooted than any other in the process of constitutional adjudication, it is that we ought not to pass on questions of constitutionality—here the distribution of the taxing power as between the State and the Nation—unless such adjudication is unavoidable. And so, as questions of federal constitutional power have become more and more intertwined with preliminary doubts about local law, we have insisted that federal courts do not decide questions of constitutionality on the basis of preliminary guesses regarding local law [citing cases]."

As we shall show in Subdivision (D) of this point, the decision of the *Duke Power Company* case by the Court of Errors and Appeals of New Jersey, during the pendency of the instant litigation, supplied the authoritative decision by the State courts on the matters of State law involved which was lacking in the *Spector* case. If at the time of the District Court's decision in the *Spector* case, there had been an equally authoritative decision on the State questions there involved by the highest court of Connecticut, there would have been, as the lower courts held here, no sound reason for subjecting the respondent to the delay and inconvenience of starting another action in the State court to obtain the same relief that could be immediately accorded in the Federal litigation.

It is clear that there is no requirement that the litigation which resolves the State questions be between the same

parties as in the Federal action. The objection to the Federal courts' proceeding to judgment while the State law is unresolved is the "absence of an authoritative and controlling determination by the state tribunals" (*Chicago v. Fieldcrest Dairies, Inc.*, 316 U. S. 168, 172 (1942)), with the result that "a federal court of equity is asked to decide an issue by making a tentative answer which may be displaced tomorrow by a state adjudication" (*Railroad Commission of Texas* v. *Pullman Company*, 312 U.S. 496, 500 (1941)). In *Findley* v. *Odland*, 127 F. (2d) 948, 953 (C. C. A. 6, 1942), and *In re Central R. Co. of N. J.*, 136 F. (2d) 633, 638 (C. C. A. 3, 1943) both of which cited the *Pullman Company* and *Fieldcrest Dairies* cases, the pertinent pending State litigation, the determination of which the district courts were ordered to await, was between parties other than the Federal litigants.

It follows that, upon the coming down of the decision of the New Jersey Court of Errors and Appeals in the *Duke Power Company* case, there was no reason for the District Court to stay its hand from the adjudication to which respondent was entitled under that decision.

We shall now proceed to develop more particularly the several propositions which lead to the above stated conclusions.

(A) The District Court had jurisdiction of this action by reason of the allegations in the complaint of discrimination against respondent constituting denial to her of the equal protection of the laws, contrary to the Fourteenth Amendment to the United States Constitution.

There can be no doubt that the constitutional question raised was a substantial one, giving the Federal court juris-

diction, in view of the inadequacy of the New Jersey remedy for the discrimination shown in the next subdivision. In *Cumberland Coal Co. v. Board of Revision*, 284 U. S. 23 (1931), this Court summarized the result of an unquestioned line of decisions as follows (pp. 28-29):

> "It is established that the intentional, systematic undervaluation by state officials of taxable property of the same class belonging to other owners contravenes the constitutional right of one taxed upon the full value of his property. *Sunday Lake Iron Co.* v. *Wakefield* [247 U. S. 350], *supra; Sioux City Bridge Co.* v. *Dakota County* [260 U. S. 441], *supra; Raymond* v. *Chicago Union Traction Co.*, [207 U. S. 20], *supra; Chicago Great Western Ry. Co.* v. *Kendall*, [266 U. S. 94], *supra.*"*

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*Cases involving legislative distinctions between different classes of property or persons for purposes of taxation must be distinguished from this rule and are not applicable here. The following extract from this Court's opinion in *Nashville, Chattanooga & St. Louis Railway* v. *Browning*, 310 U. S. 362, 367-8 (1940) makes plain this distinction:

> "It must be emphasized that the Company makes no claim that its property is singled out from among other public service corporations for discrimination. Its asserted grievance is common to the whole class. We must put to one side therefore all those cases relied on by the petitioner which invoked the Fourteenth Amendment against discriminations invidious to a particular taxpayer. *Raymond* v. *Chicago Traction Co.*, 207 U. S. 20; *Sunday Lake Iron Co.* v. *Wakefield*, 247 U. S. 350; *Sioux City Bridge* v. *Dakota County*, 260 U. S. 441; *Bohler* v. *Callaway*, 267 U. S. 479; *Cumberland Coal Co.* v. *Board*, 284 U. S. 23; *Iowa-Des Moines Bank* v. *Bennett*, 284 U. S. 239. All these cases are inapposite. None denied power to a state to apply different yardsticks to different classes of property."

It makes no difference that the allegations of discrimination in the complaint were denied in the answer. It is well settled that jurisdiction is to be "determined by the allegations of the bill" (*Utah Fuel Co.* v. *National Bituminous Coal Commission*, 306 U.S. 56, 60 (1939)) "if there be enough of substance in them to require the Court to hear and determine the cause" (*Flanders* v. *Coleman*, 250 U.S. 223, 227 (1919)).

There can be no question here of the substantiality of the allegations. It was alleged (Complaint, Par. 41, R. 32-33) that the assessing authorities in the taxing districts, not only of Hillsborough but of Somerset County and of other counties in New Jersey, and the County and State authorities charged with the duty of revising, correcting and equalizing assessments, have "consistently, systematically, intentionally and notoriously failed to assess at true value, or at all, the intangible personal property owned by taxpayers generally" even though required to do so by the Constitution and statutes of the State; that the authorities involved "deliberately singled out the plaintiff, individually and as such Trustee, with the intent and for the purpose of imposing * * * a crushing and discriminatory burden of taxation grossly disproportionate to the taxes imposed upon other taxpayers." It was further alleged (Par. 42, R. 33-34) that this discrimination "was at the instigation of one Alfred L. Kirby, a tax ferret and informer, widely known as such in the State of New Jersey, for the personal gain of said Kirby"; that Kirby had an arrangement with the Township of Hillsborough whereby he undertook to indemnify and save harmless the Township against all costs and expense, including counsel fees, and whereby Kirby was to receive as his compensation a substantial percentage

of all taxes which might be collected under the purported assessments; and that Kirby persuaded the taxing authorities so to single out respondent because such action was without risk of loss or expense to the Township and "was at a time and in a manner which would not reduce the tax rate for said years or increase the ratables subject to said tax rate in peril of subsequent reduction of the ratables and tax collections in the event of successful resistance to said assessments". As was said in *Green* v. *Passaic County Board of Taxation*, 131 N.J.L. 13, 17, 34 A. (2d) 245, 247 (Sup. Ct. 1943):

> "It seems, therefore, that the borough stands to be the sole beneficiary without sharing with the county or the state in whatever tax increment may flow from this proceeding [brought under Sec. 54:3-20 to add property 'omitted in the assessment'] * * *."

Such a situation was described by Mr. Justice Bodine in the *Duke Power Company* case (129 N.J.L., p. 455, 30 A. (2d), p. 420) as "a municipal windfall." Here the result would have been to render unnecessary for something over a century the levying of any taxes in the Township to meet its annual budget of about $96,000.

(B) The jurisdiction is not affected either by the Johnson Act or the equitable rule followed in Great Lakes Dredge & Dock Co. v. Huffman because there is no adequate remedy in the administrative agencies or the courts of New Jersey for relief from unconstitutional discrimination.

The Johnson Act (Sec. 24(1) of the Judicial Code, 28 USC 41(1), as amended August 21, 1937, provides as follows:

> "Notwithstanding the foregoing provisions of this paragraph, no district court shall have jurisdiction of any suit to enjoin, suspend, or restrain the assessment, levy, or collection of any tax imposed by or pursuant to the laws of any state where a plain, speedy, and efficient remedy may be had at law or in equity in the courts of said State."

The question whether this statute applies to a declaratory judgment action the prayer in which is for an adjudication that state tax assessments are void, but does not include a prayer for injunctive relief, was expressly left open in *Great Lakes Dredge & Dock Co.* v. *Huffman*, 319 U. S. 293 (1943), and this Court has not since had occasion to consider it. And the question is not present here. What this Court said in the *Huffman* case was (p. 299):

> "But we find it unnecessary to inquire whether the words of the statute may be so construed as to prohibit a declaration by federal courts concerning the invalidity of a state tax. For we are of the opinion that those considerations which have led federal courts of equity to refuse to enjoin the collection of state taxes, save in exceptional cases, require a like restraint in the use of the declaratory judgment procedure."

This Court went on to say (p. 300):

> "Called upon to adjudicate what is essentially an equitable cause of action, the district court was as free as in any other suit in equity to grant or withhold the relief prayed, upon equitable grounds."

Where, as here, an adequate remedy by State process from an exaction which offends the Fourteenth Amendment is absent, or where uncertainty surrounds the adequacy of

such remedy, the Federal jurisdiction is plain, regardless of whether the action is of a kind to which the Johnson Act would otherwise apply. That was explicitly held in *Spector Motor Co. v. McLaughlin*, 323 U. S. 101 (1944), where this Court said (pp. 105-6):

> "The District Court had jurisdiction to entertain this bill and to give whatever relief is appropriate despite the Johnson Act and *Great Lakes Dredge Co. v. Huffman*, 319 U. S. 293, because of the uncertainty surrounding the adequacy of the Connecticut remedy. See *Waterbury Savings Bank v. Lazder*, 46 Conn. 243; *Wilcox v. Town of Madison*, 106 Conn. 223, 137 A. 742."

Since the Connecticut law did make possible a determination of the State questions involved in that case, through an action for declaratory judgment, this Court remanded the cause to the District Court to retain the bill pending the determination of such an action in the State court. The Federal jurisdiction was not denied; it was retained.

In this case the situation is *a fortiori*. We submit that there was complete absence of adequate remedy for unconstitutional discrimination in taxation through the administrative and judicial agencies of New Jersey.

Art. IV, Sec. 7, Par. 12, of the Constitution of the State of New Jersey provides:

> "Property shall be assessed for taxes under general laws, and by uniform rules, according to its true value."

The General Tax Act of the State of New Jersey (R.S. 54:4-1) provides:

> "All property, real and personal, within the jurisdiction of this state not expressly exempted from

> taxation or expressly excluded from the operation of this chapter shall be subject to taxation annually under this chapter at its true value, and shall be valued by the assessors of the respective taxing districts * * *"

The administrative bodies and courts of New Jersey have interpreted this constitutional and statutory requirement of assessment at "true value" as precluding the only relief for the taxpayer discriminated against that this Court regards as adequate, namely, "to have his assessment reduced to the percentage" of the true value at which others were assessed (*Sioux City Bridge Co.* v. *Dakota County*, 260 U.S. 441, 446 (1923)).

In a long line of decisions, dating back as far as 1856, the courts of New Jersey have held that a taxpayer who has been singled out for discriminatory taxation is restricted to plenary statutory proceedings against the other members of his class for the purpose of having the same burden of taxation placed upon their shoulders as that placed upon his; that he may not on his own appeal obtain equalization by a reduction of his own assessment. The latest cases also hold that in the trial of his own tax appeal the taxpayer may not even introduce evidence of the discrimination, but is limited to producing evidence that the assessment upon his own property is in excess of true value.

The leading New Jersey case is *Royal Mfg. Co.* v. *Board of Equalization of Taxes*, 76 N.J.L. 402, 70 Atl. 978 (Sup. Ct. 1908), affirmed 78 N.J.L. 337, 74 Atl. 525 (Ct. Err. & App. 1909). In the New Jersey Supreme Court the opinion by Mr. Justice Parker said (76 N.J.L., pp. 404-5, 70 Atl. pp. 978-9):

> "A number of reasons are advanced, but they all are fairly comprised within these two, excepting one

point with regard to the alleged rejection of evidence by the state board, which will now be disposed of with the first reason. So far as this claim is concerned, viz., that there are other properties in Rahway worth more than this one and valued at less, this would be a good ground for pressing for an increase of valuation for the other properties, but not for reducing the valuation of the property in question. Any taxpayer, who considers that other property in the same tax district is undervalued, is entitled to go to the county board and apply to have the valuation of such other property raised. P.L. 1906, p. 212, §3*; *Laflin & Rand Powder Company* v. *Township of Wayne* (N.J. Sup.) 68 Atl. 909. Since the passage of the act creating a county board of taxation (P.L. 1906, p. 210), there has been no legal warrant, if there ever was any, for scaling down valuations of taxable property in this state by adopting a uniform percentage of actual value, although such was the general practice for years. By that act the county boards are required to secure taxation of all property at its true value; so that the fact that the property of A. is assessed at its true value, and the property of other taxpayers within the same district is assessed below its true value, affords A. no ground for demanding a reduction of his valuation, though it does entitle him to apply for an increase in the valuation of the others. It therefore follows, not only that the first reason was without any legal merit, but that the offer to prove before the state board on the appeal from the valuation of the prosecutor's property that other property was valued proportionately lower was properly rejected by that board."

*Section 3 of the County Board Act of 1906 became Section 701 of the Tax Revision of 1918 (P.L. 1918, ch. 236, p. 879) which in turn became R.S.N.J. 54:3-21, 22.

On the affirmance Chief Justice Gummere for the Court of Errors and Appeals said (78 N.J.L., p. 338, 74 Atl., p. 526) that the decision below was right because

> "the Constitution requires that property shall be assessed for taxation according to its true value, and a reduction below true value would be a violation of that constitutional provision. * * *"

That decision had been anticipated by five decisions, one of which, like the *Royal Mfg. Co.* case, received the unanimous affirmance of the Court of Errors and Appeals: *State* v. *Randolph*, 25 N.J.L. 427, 431 (Sup. Ct. 1856); *State, Paulison, Pros.* v. *Taylor*, 35 N.J.L. 184, 189 (Sup. Ct. 1871); *State, Wharton, Pros.* v. *Koster*, 38 N.J.L. 308 (Sup. Ct. 1876); *State, Maxson, Pros.* v. *Segoine*, 53 N.J.L. 339-40, 21 Atl. 852 (Sup. Ct. 1891), affirmed 54 N.J.L. 212, 25 Atl. 963 (Ct. Err. & App. 1891); *Central R. Co. of N. J.* v. *State Board of Assessors*, 74 N.J.L. 1, 65 Atl. 244 (Sup. Ct. 1906).

Royal Mfg. Co. v. *Board of Equalization of Taxes* was followed in *Pennsylvania Coal Co.* v. *Saddle River*, 96 N.J.L. 40, 43, 114 Atl. 157, 158 (Sup. Ct. 1921), in which the opinion of the Supreme Court dismissed the argument based on discrimination, as follows:

> "Thirteenth, that the Fourteenth Amendment was infringed by the county board 'singling out' the coal in question for a raise in valuation to its full value without doing the same to other property. This is a different matter and may be dismissed in a word. We find no evidence, and prosecutor cites none, indicating that the county board discriminated in any such manner, but if it appraised the coal at its full market value, that is what the law called for.

> and if this was not done in other cases prosecutor had its remedy under the tax act. P. L. 1918, p. 879, §701."

The remedy referred to was the right to institute proceedings against all other taxpayers of the class for the purpose of increasing their assessments. (Section 701 of the Tax Revision of 1918, now R.S.N.J. 54:3-21 and 22).

That so-called remedy this Court in *Sioux City Bridge Co.* v. *Dakota County*, 260 U. S. 441 (1923) held to be no remedy at all. The charge made by the Bridge Company in that case was that the State intentionally and arbitrarily assessed its property at 100% of its true value and all other real estate and its improvements in the county at 55%. The applicable Nebraska statute, as authorized by its Constitution, required the assessment to be based on actual value. The Nebraska court held that the Bridge Company had no remedy except "to have the property assessed below its true value raised rather than to have property assessed at its true value reduced", which was precisely the rule adopted by New Jersey. This Court said (p. 446):

> "The conclusion in these and other federal authorities is that such a result as that reached by the Supreme Court of Nebraska is to deny the injured taxpayer any remedy at all because it is utterly impossible for him by any judicial proceeding to secure an increase in the assessment of the great mass of under-assessed property in the taxing district. This Court holds that the right of the taxpayer whose property alone is taxed at 100 per cent. of its true value is to have his assessment reduced to the percentage of that value at which others are taxed even though this is a departure from the requirement of statute."

The same rule was enunciated by this Court in *Iowa-Des Moines National Bank* v. *Bennett*, 284 U. S. 239, 247 (1931), as follows:

> "The right invoked is that to equal treatment; and such treatment will be attained if either their competitors' taxes are increased or their own reduced. But it is well settled that a taxpayer who has been subjected to discriminatory taxation through the favoring of others in violation of federal law, cannot be required himself to assume the burden of seeking an increase of the taxes which the others should have paid. *Cumberland Coal Co.* v. *Board of Revision, supra; Greene* v. *Louisville & Interurban R. Co.*, 244 U. S. 499, 514-518; *Chicago Great Western Ry. Co.* v. *Kendall*, 266 U. S. 94, 98; *Sioux City Bridge Co.* v. *Dakota County, supra.*"

Petitioners' brief (p. 22) says that the leading New Jersey decision, the *Royal Manufacturing Company* case, was decided in 1909 whereas the *Sioux City Bridge* case was not decided by this Court until 1923, and that in the former case no reference was made to any case in this Court holding that the taxpayer's constitutional right has been violated when administrative bodies and State courts fail to provide an adequate remedy for intentional and systematic discrimination. The point of chronology is without merit.

The *Sioux City Bridge* case by no means originated the Federal rule. It goes back at least to the year 1879, when this Court decided *Cummings* v. *National Bank*, 101 U. S. 153. The rule that the only adequate remedy to the taxpayer discriminated against was to reduce his own assessment was enunciated in 1898 in a decision of the Circuit Court of Appeals for the Sixth Circuit in the case of *Taylor*

v. *Louisville & Nashville R. R. Co.*, 88 Fed. 350, 364, 365 (opinion by Circuit Judge Taft) and the specific language of that opinion was approved and incorporated in the opinion of this Court in *Greene* v. *Louisville & Interurban R. R. Co.*, 244 U. S. 499, 516-517, 518 (1917).

As above appears, the Federal question under the Fourteenth Amendment was raised unsuccessfully in New Jersey in the *Saddle River* case in 1921. And in *Hackensack Water Co.* v. *Woodcliffe Lake*, 104 N. J. L. 48, 49, 139 Atl. 410, 411 (Sup. Ct. 1927), the court expressly refused to follow the decision of this Court in the *Sioux City Bridge Co.* case, saying:

> "The prosecutor urges that the case of *Sioux City Bridge Co.* v. *Dakota County*, Neb., 260 U. S. 441, is authority for the position which it takes—namely, that it is entitled to show discrimination and to obtain a lowering of its assessment to the percentage that other assessments in Woodcliffe Lake borough bear to the market value of the property assessed.
>
> "In the *Sioux City* Case the Supreme Court of the United States held that the bridge company was entitled to equality of taxation, and that if other property was assessed at only 55 per cent. of its true market value, that the assessment upon the property of the bridge company would be decreased to the same percentage of market or true value at which other property was assessed.
>
> "The difficulty with the contention of the prosecutor in the present case is twofold. In the first place, the Constitution of this state requires that property shall be assessed for taxation according to its true value. In the case of *Royal Manufacturing Co.* v. *Board of Equalization of Taxes*, 78 N. J. L. 337, 74 A. 525, the Court of Errors and Appeals decided that the fact that other property in a taxing

district is assessed for taxation at less than its true value affords no ground for reducing the assessment upon the ground of a complaining taxpayer below the true value thereof."

Petitioners contend that all cases in this unbroken line of New Jersey authorities were in effect overruled by the case of *Central R. Co.* v. *Martin, State Tax Commissioner*, 112 N.J.L. 5, 169 Atl. 489 (Ct. of Err. & App. 1933) which, they say, recognized the rule of the *Sioux City Bridge Company* case and other similar decisions of this Court as applicable in New Jersey. The Court below did not so interpret that opinion, and we submit that its conclusion thereon was correct.

The *Martin* case did not arise under the General Tax Act, (Subtitle 2 of Title 54 of the New Jersey Revised Statutes, Appendix p. iii) here applicable, but under the Railroad Tax Act (Part 4 of Subtitle 4, Appendix p. vi). Necessarily, therefore, the applicability of the sections of the General Tax Act, whereunder the New Jersey courts have confined general taxpayers "singled out" for discriminatory taxation to the inadequate relief specified in R. S. N. J. 54:3-21 and 22, was not before the courts in the *Martin* case. In that case a railroad challenged the tax rate applied to railroads. It alleged no facts to support a case of discrimination within the railroad class. It did not seek either to obtain a reduction in the assessed valuations placed upon its own properties to the level of the valuations placed upon the properties of taxpayers assessed under the General Tax Act, or to obtain an increase in the valuations placed upon the properties of such general taxpayers. Its objective was to obtain a recomputation of the rate at which it had been taxed on its main-stem and tangible personal property and

franchise, which was the rate applied to railroads generally.* That rate, known as the "average rate of taxation" (R. S. N. J. 54:24-3), was ascertained by dividing the aggregate of the ratables assessed under the General Tax Act into the aggregate amount of taxes to be raised thereunder (*ibid.*). The railroad's contention was that its tax rate was excessive because the valuations placed upon properties assessed under the General Tax Act were below the true values and that the resulting divisor of the average tax rate formula was therefore too low. The Court of Errors and Appeals held that the railroad had failed to sustain its contention by sufficient competent proof. When the case reached the courts, the Railroad also attempted (112 N. J. L., pp. 6-8, 169 Atl., pp. 489-490) to raise questions of unlawful discrimination in violation of the Fourteenth Amendment, and to relate the proof that it had offered in the Board of Taxes and Assessments and by depositions in the Supreme Court to the rule of the *Sioux City Bridge Company* case and similar decisions of this Court. Mr. Justice Perskie, writing for the Court of Errors and Appeals, reviewed this evidence and held, for a unanimous Court, that it did not meet the test of a systematic and intentional undervaluation of property other than railroad property. In so doing the Court simply decided that the point raised by the railroad was not supported by the facts. It was therefore unnecessary for the Court to consider the question whether,

*The statement in petitioners' brief at page 18 that the Railroad "sought to have its tax reduced to a 60% basis" is erroneous, as the portion of the *Martin* opinion quoted at pages 21-22 of petitioners' brief, demonstrates. That quotation clearly shows that the railroad's "basic or fundamental grievance" was the tax rate of $4.081 per $100 of assessed value of property devoted to railroad purposes, which rate it sought to have reduced to $2.093 per $100 of value.

if such a pattern of systematic discrimination had been proved, New Jersey would have accorded any relief therefor.

None of the cases which we have above cited as establishing the New Jersey law that there is no such remedy was so much as cited in the opinion in the *Martin* case. Clearly, we submit, the Court of Errors and Appeals could not have intended to overrule such an unbroken line of authority without any discussion thereof.

That the *Martin* case is not regarded by the courts of New Jersey as having any bearing upon the issue of remedy for unlawful discrimination is clearly shown by a decision, less than a year later, by Mr. Justice Perskie, the very same judge who wrote the opinion for the Court of Errors and Appeals in the *Martin* case. (*Lehigh Valley R. R.* v *State Board*, 12 N.J. Misc. 673, 174 Atl. 359 (Sup. Ct. 1934).) That case arose under the General Tax Act, as did the *Royal Mfg. Co.* case and as does this case; so the precise point involved in the instant case was at issue there. Mr. Justice Perskie for the Court said (12 N.J. Misc., p. 675, 174 Atl., p. 360):

> "Did the state board commit an error in law in refusing to hear the testimony of petitioners touching discrimination? Decidedly no. It is the established law of this state that the fact that other property in a taxing district is assessed for valuation at less than its true value affords no ground for reducing the assessment placed upon the property of a complaining taxpayer below the true value thereof. *Royal Manufacturing Co.* v. *Board of Equalization of Taxes*, 78 N.J.L. 337, 74 Atl. Rep. 525. The petitioners concede this to be true, but contend that the rule to the contrary, as announced in the cases of which *Sioux City Bridge Co.* v.

> *Dakota County*, 260 U.S. 441, is typical, should be followed, and that the holding of *Royal Manufacturing Co. v. Board of Equalization of Taxes, supra*, should be disapproved. A substantially like contention was made and denied by this court in the case of *Hackensack Water Co. v. State Board of Taxes and Assessment*, 104 N.J.L. 48, 139 A. 410. The law, on this point, is also settled and controlling."

In that case Mr. Justice Perskie did not even mention the *Martin* case, the opinion in which he had himself written less than a year before. Instead, he referred to the *Royal Manufacturing Co.* case as "the established law of this State" and to it and the *Hackensack Water Company* case as being "controlling" in spite of the decision of this Court in the *Sioux City Bridge Co.* case.

It is clear, therefore, that the *Martin* case has no bearing on the law of New Jersey on this subject. Petitioners say (Br. p. 23) that the *Martin* case could not be overruled by the subordinate New Jersey Supreme Court. That is true, but irrelevant. The question is rather whether the *Martin* case should be interpreted as overruling the prior decisions of the Courts of New Jersey including those of the Court of Errors and Appeals. It did not purport to do so, even by way of dictum, and no such holding can be inferred.

We submit, therefore, that there was a complete absence of remedy in the administrative agencies and courts of New Jersey for discriminatory taxation violative of the Fourteenth Amendent. Under the New Jersey authorities above cited, neither the administrative agencies nor the courts would even have permitted respondent to introduce

evidence to support her contention that the administration of the New Jersey system of taxation of personal property had been intentionally and systematically to omit all assessment of intangible property of the sort which was the subject of the disputed assessments here.*

But, at the very least, it is plain that any remedy offered by New Jersey was not "plain, adequate and complete" within the language of this Court's decisions stating the rule in equity or "plain, speedy and efficient" within the

*Petitioners' brief (p. 16) says that in the *Duke Power Company* case the claim of discrimination had been one of the grounds of appeal to the State Tax Board and in that connection cites an extract from the opinion of the Board in *Duke Power Company* v. *Hillsborough Township*, 20 N.J. Misc. 240, 26 A. (2d) 713. The implication is that, if the Duke Power Company had attempted to prove the charge of discrimination, a hearing would have been accorded thereon. The record does not support that implication. The fact, as appears from the record in that case, is that before the trial in the State Board, the Duke Power Company filed as a part of the record a paper setting forth the New Jersey cases on the discrimination question and concluding:

> "These decisions are of course binding upon this Board. By reason of them it is impossible for the Duke Power Co. to secure the relief against this discrimination which the Supreme Court [of the United States] has held to be the proper and only adequate remedy. In the quotation made from Mr. Justice Perskie's opinion he said the State Board had not committed an error of law in refusing to hear the testimony of petitioners touching discrimination. On this account the Duke Power Co. withdraws the points of its petition of appeal with respect to discrimination and will offer no evidence in support of them or the claimed discrimination."

The discrimination point was therefore entirely out of the *Duke Power Company* case both at the trial before the administrative agency, the State Tax Board, and in the judicial proceedings before the Supreme Court of New Jersey and the Court of Errors and Appeals.

language of the Johnson Act. Instead, the adequacy of the New Jersey remedy would still be surrounded by uncertainty, within this Court's holding in the *Spector* case, even if it were assumed that the decision of the Court of Errors and Appeals in the *Martini* case were sufficient to raise some doubt as to whether the preceding line of decisions and the later *Lehigh Valley* case would, in a case that raised the question, be followed by it. The State remedy which would cause a Federal court having jurisdiction on traditional grounds to stay its hand from the exercise thereof must be one free from doubt, which does not "leave the plaintiff's to a speculation upon what the State Court might say if an action at law were brought". (Holmes, J., in *Wallace* v. *Hines*, 253 U.S. 66, 68 (1920).) (*Union P. R. Co.* v. *Weld County*, 247 U.S. 282, 285-6 (1918); *Dawson* v. *Kentucky Distilleries Co.*, 255 U.S. 288, 296 (1921); *Atlantic Coast Line R. Co.* v. *Daughton*, 262 U.S. 413, 426 (1923); *American Life Insurance Co.* v. *Stewart*, 300 U.S. 203, 212, 214-215 (1937).)

The situation being such with respect to the remedy for denial of the Federal constitutional right, which gave the courts below jurisdiction, it would not matter if there were a remedy under the branch of the case which concerns the construction of Section 54:3-20 of the New Jersey Revised Statutes. In *Greene* v. *Louisville & Interurban R. Co.*, 244 U.S. 499 (1917), which was a Federal suit in equity to enjoin local taxes on grounds under the State law and also because they were discriminatory in violation of the Fourteenth Amendment, without adequate remedy therefor under the State law, this Court said (p. 520):

> "A remedy at law cannot be considered adequate, so as to prevent equitable relief, unless it covers the

> entire case made by the bill in equity. Were we to require a dismissal of these bills as to the state taxes, retaining them as to the local taxes, we should multiply suits, instead of preventing a multiplicity of suits. It is a familiar maxim that 'a court of equity ought to do justice completely, and not by halves;' and to this end, having properly acquired jurisdiction of a cause for any purpose, it should dispose of the entire controversy and its incidents, and not remit any part of it to a court of law. [citing cases]".

See also *Risty* v. *Chicago, Rock Island and Pacific Ry. Co.*, 270 U.S. 378, 388 (1926).

At the time of the filing of the complaint in this action, however, not even the New Jersey remedy under the State ground was certain, as we show in the following subdivision.

(C) At the time the complaint herein was filed it was not clear under New Jersey law that an omitted property assessment made after April 1, without prior notice or hearing, was null and void under Revised Statutes, Section 54:3-20.

The correctness of the decision of the courts below herein on the invalidity of the assessment under New Jersey Revised Statutes, Section 54:3-20 will be argued in Point II. Our purpose in this subdivision is merely to summarize the legal situation as of the date of the filing of the complaint in the instant case.

The assessment procedure adopted by petitioners in this case was admittedly predicated upon the first two sentences of Section 54:3-20 relating to omissions "by the assessor." At the time of the filing of the complaint herein the question whether that part of the statute applied to pro-

ceedings after April 1 to assess property omitted "in the assessment", without compliance with the requirements of prior notice and hearing prescribed by the third sentence, was being litigated in the administrative agencies of New Jersey by the Duke Power Company. Some ten and one-half months after the complaint herein was filed the State Board of Tax Appeals held that an assessment of omitted property after April 1 by resolution of a County Board of Taxation under the first two sentences of the section was valid; that subsequent notice of the time and place of the next meeting of the County Board was sufficient; and that, if there were any defects in such procedure, they might be disregarded under the so-called remedial statutes (R.S.N.J. 54:4-58 and 59).

Until that decision of the Board of Tax Appeals was reversed by the Supreme Court and the Court of Errors and Appeals of New Jersey, no New Jersey case had expressly held that for an assessment of omitted property made after April 1 the procedure prescribed in the third sentence of Section 54:3-20 was exclusive; and it was not clear under the decisions whether the remedial statutes were applicable to the facts of this case. In fact, the *Duke Power Company* case and this one were the first cases in New Jersey to raise the question whether the two forms of procedure prescribed respectively by the first part and the second part of Section 54:3-20 were alternatively available to the taxing authorities where assessments were attempted after April 1, when the work of assessment had been completed and the tax rate had been definitely fixed. There had therefore been no prior occasion for the courts of New Jersey to consider either this aspect of the proper interpretation of Section 54:3-20 or the question of the applicability of the remedial statutes thereto.

At the time this declaratory judgment action was started, therefore, the result of a suit, if brought in the courts of New Jersey upon the State ground therein alleged, would have been unpredictable. It follows that if, at the time of the complaint herein, or at any time during the pendency of this case prior to the decision of the Court of Errors and Appeals in the *Duke Power Company* case, an application for a summary judgment on the ground of the nullity of the assessment under the third sentence of Section 54:3-20 had been made, the Federal court would have been called upon to exercise a nice discretion whether or not to decide it before the State courts had spoken with clarity on the question.

The situation at that point was that the District court had jurisdiction, due to the absence or uncertainty of the State remedy with respect to the Federal question of discrimination, but had as yet no sufficient light in the New Jersey authorities to enable it with any assurance to decide the case on the State questions.

(D) Upon the decision of the New Jersey Court of Errors and Appeals in the Duke Power Company case, it became appropriate for the District Court to exercise its jurisdiction by deciding in respondent's favor on grounds of State law and thus avoid the necessity of deciding the questions raised under the United States Constitution.

The decision of the *Duke Power Company* case on March 9, 1944 by the New Jersey Court of Errors and Appeals, "for the reasons expressed in the opinion delivered by Mr. Justice Bodine in the Supreme Court", removed the last impediment to the decision of the instant case on the ground of the nullity under Section 54:3-20 of the disputed assessments against respondent. Except for the prior uncertainty of the New Jersey law on that subject, the right

of the courts below to decide the case on that ground had always been clear.

It has long been the established law that, where a Federal court has jurisdiction, it has both the right and the duty of disposing of the case on State rather than Federal grounds. A leading case is *Siler* v. *Louisville & Nashville R. Co.*, 213 U. S. 175, 191, 193 (1909), a Federal suit in equity to enjoin State rates on the grounds that they were unauthorized by the State and violated the Federal Constitution, with no adequate State remedy therefor. This Court held that the allegations of the bill gave the Federal court equity jurisdiction and thereby

> "* * * the right to decide all the questions in the case, even though it decided the Federal questions adversely to the party raising them, or even if it omitted to decide them at all, but decided the case on local or state questions only.
>
> "This court has the same right, and can, if it deem it proper, decide the local questions only, and omit to decide the Federal questions, or decide them adversely to the party claiming their benefit [citing cases.]
>
> * * * * * * *
>
> "Where a case in this court can be decided without reference to questions arising under the Federal Constitution, that course is usually pursued and is not departed from without important reasons."

The decision was approved on extended consideration as stating the fundamental law on this subject in *Hurn* v. *Oursler*, 289 U. S. 238, 243-8 (1933). In *Greene* v. *Louisville & Interurban R. Co.*, 244 U. S. 499 (1917), this Court said (p. 508):

> "* * * This being so, the jurisdiction of that [the lower Federal] court extended, and ours on appeal

> extends, to the determination of all questions involved in the case, including questions of state law, irrespective of the disposition that may be made of the federal question, or whether it be found necessary to decide it at all." [citing the *Siler* Case, *supra*, and *Ohio Tax* Cases, 232 U. S. 576, 586 (1914).]

And this doctrine was followed in two other tax cases in *Risty* v. *Chicago Rock Island & Pacific Ry. Co.*, 270 U. S. 378 (1926); and *Waggoner Estate* v. *Wichita County*, 273 U. S. 113, 116 (1927). In the *Risty* Case, at p. 387, this Court said:

> "As our decision in these cases turns on the construction and application of the state law, we do not pass upon the Constitutional questions raised. See *Bohler* v. *Callaway*, 267 U. S. 479, 489; *Chicago G. W. R. Co.* v. *Kendall*, 266 U. S. 94, 97-98. They are, however, questions of substance and sufficient to give the court jurisdiction to pass on the whole case. *Greene* v. *Louisville & Interurban R. R. Co.*, *supra*; *Chicago G. W. R. Co.* v. *Kendall*, *supra*; *Bohler* v. *Callaway*, *supra*."

We discuss the *Duke Power Company* case in detail in Point II. It is sufficient for purposes of the present discussion to say that it held comprehensively, on an indistinguishable state of facts, that proceedings in accordance with the first two sentences of Section 54:3-20 were unauthorized; that the failure to give notice and accord a hearing thereon prior to the making of the assessment made the attempted imposition of the tax null and void; and that nullities could not be made valid assessments by the remedial statutes.

The only remaining question is whether the courts below should, instead of themselves rendering judgment for petitioners, have remitted respondent to the New Jersey state

courts to have the law, as laid down in the *Duke Power Company* case, applied in a new action in the State courts instead of being applied at once in the Federal court action. Certainly the traditional rules which usually govern the exercise of Federal jurisdiction are against imposing upon litigants the delays and inconvenience which would inevitably result from such a course. In *Meredith* v. *Winter Haven*, 320 U. S. 228 (1943), the Court said (p. 237):

> "We are pointed to no public policy or interest which would be served by withholding from petitioners the benefit of the jurisdiction which Congress has created with the purpose that it should be availed of and exercised subject only to such limitations as traditionally justify courts in declining to exercise the jurisdiction which they possess. To remit the parties to the state courts is to delay further the disposition of the litigation which has been pending for more than two years and which is now ready for decision. It is to penalize petitioners for resorting to a jurisdiction which they were entitled to invoke, in the absence of any special circumstances which would warrant a refusal to exercise it."*

To the same effect see *Cooper* v. *American Air Lines, Inc.*, 149 F. (2d) 355 (C. C. A. 2, 1945); *In re President and Fellows of Harvard College*, 149 F. (2d) 69 (C. C. A. 1, 1945).

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*It is even doubtful whether at this time, over four years after the proceedings in the instant case were started, and after the adoption by the Somerset County Board of Taxation of the resolutions here in controversy, there is left any remedy available to respondent to cancel the assessments under question. In New Jersey, lack of jurisdiction of the County Board or irregularity in its proceedings is tested in the New Jersey Supreme Court on certiorari to that court. *Schwartz* v. *Essex County Board of Taxation*, 130 N. J. L. 177, 32 A. (2d) 354 (Ct. Err. & App. 1943), affirming 129 N. J. L. 129, 28 A. (2d) 482 (Sup. Ct.

This Court in the *Winter Haven* case recognized that only in exceptional circumstances will Federal courts refuse to exercise their jurisdiction to decide questions of State law. One of these exceptions, that "a Federal Court having jurisdiction of the cause may decline to interfere * * * with the collection of State taxes or with the fiscal affairs of the State" (320 U. S., p. 235) is a restatement of the equitable rule of cases such as *Matthews* v. *Rodgers*, *supra*, and the *Huffman* case, *supra*, which rule has heretofore been discussed and found to be inapplicable to the instant case (*supra*, pp. 17, 24-5).

The *Central Railroad of New Jersey* and *Odland* cases previously cited in this brief (*supra*, p. 20) clearly indicate that the rule of the *Siler* case, (*supra*, p. 41) is to be applied as soon as the State law has been established in cases pending between litigants other than the Federal litigants. By the time the motion for summary judgment was made in the instant case, authoritative evidence of State law, which the district courts were ordered to await in the *Spector*

1942). The appeal provided to the State Division of Tax Appeals was by rule of that body barred ninety days after the adoption of the resolutions on June 26, 1941. The New Jersey Supreme Court has the inherent right to review by certiorari but its exercise thereof is purely discretionary and the allowance of the writ is not a matter of right. *Staubach* v. *Cities Service Oil Co.*, 130 N. J. L. 157, 31 A. (2d) 804 (Ct. Err. & App. 1943), dismissing appeal from 127 N. J. L. 577, 24 A. (2d) 193 (Sup. Ct. 1942). And the Supreme Court's refusal to allow a writ may not be judicially reviewed by the Court of Errors and Appeals. *Staubach* v. *Cities Service Oil Co.*, *supra*; *Post* v. *Anderson*, 111 N. J. L. 303, 168 Atl. 622 (Ct. Err. & App. 1933), affirming 11 N. J. Misc. 1 (Sup. Ct. 1932). Review on certiorari was denied on facts somewhat analogous to those here in *Red Oaks, Inc.* v. *Dorez, Inc.*, 117 N. J. L. 280, 187 Atl. 737 (Sup. Ct. 1936).

Fieldcrest, Pullman, Central Railroad Company and *Odland* cases had been provided by the New Jersey courts in the *Duke Power Company* case. The judgment of the District Court on the State ground was therefore timely and manifestly correct.

POINT II

THE COURTS BELOW CORRECTLY CONSTRUED AND APPLIED THE LAW OF NEW JERSEY AS ENUNCIATED BY ITS HIGHEST COURTS IN THE DUKE POWER COMPANY CASE.

The *Duke Power Company* case, as above stated, squarely held that an assessment based on a procedure identical with the procedure used in the instant case is absolutely null and void under the laws of New Jersey.

The facts of that case are stated at pages 10 and 11 of this brief. The Company took an appeal from the action of the Somerset County Board of Taxation to the State Board of Tax Appeals. It made two contentions, first that the assessment was void under R.S.N.J. 54:3-20, and, second, that the property covered thereby was exempt from taxation in New Jersey pursuant to R.S.N.J. 54:4-3.2 as having been already taxed in North Carolina.

The opinion of the New Jersey State Board of Tax Appeals, on June 2, 1942, reported at 20 N. J. Misc. 240 and 26 A. (2d) 713, discusses these contentions in the order above stated and at great length. As to the first contention, which is here alone material, the Board held (20 N. J. Misc., pp. 246-257, 26 A. (2d), pp. 719-724) that the two parts of Section 54:3-20 gave the County Board of

Taxation alternative methods of assessing omitted property, regardless of whether the assessment was before or after April 1, and that where it "*chooses to act* with respect to omitted property, *on its own motion*, or on information known to one of its members or otherwise received, it may add the property by resolution forthwith, giving notice of the time and place of its next meeting to the taxpayer affected" (italics the Board's). (20 N. J. Misc., p. 248, 26 A. (2d), p. 719). It then discussed the so-called remedial statutes as follows (20 N. J. Misc., p. 250, 26 A. (2d), p. 720):

> "Another view of these matters requires the same result. Respondent contends that the objections assigned by the petitioner to the proceedings of November 22, and of December 2, 1940, are, at most, irregularities or illegalities amendable under R.S. 54:4-58, N.J.S.A.* 54:4-58, and that on this review it is the duty of this board, under R.S. 54:4-59, N.J.S.A. 54:4-59, to make such amendment and to determine the sum for which petitioner was lawfully taxable by the respondent taxing district, for the tax year 1939. We are in accord with this view."

In the comprehensive consideration of the question which follows (20 N. J. Misc., pp. 250-258, 26 A. (2d), pp. 721-724) the Board of Tax Appeals cited and discussed every case relied on by petitioners herein in the part of their brief (pp. 33-41) dealing with these remedial statutes, and

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*"N.J.S.A.", cited in the opinions in the Duke Power Company litigation, refers to "New Jersey Statutes Annotated," the numbering of which corresponds to that of the Revised Statutes of New Jersey.

they cite no case that was not relied upon by the Board of Tax Appeals; indeed, the treatment of this subject in petitioners' brief is strikingly similar to the discussion in the Board's opinion. Applying the remedial statutes, and particularly the provision of Section 54:4-59 that the court reviewing the tax "shall amend all irregularities, errors or defects, and may if necessary ascertain and determine the sum for which the person or property was legally liable and by order or decree fix the amount thereof", the Board of Tax Appeals conducted a trial *de novo* on the questions of valuation and exemption and reached the conclusion that the total assessable amount of property, which it held was not exempt, was $11,004,815.44 (20 N. J. Misc., pp. 258-269, 26 A. (2d), pp. 724-729).

On review by the New Jersey Supreme Court on writ of certiorari (129 N.J.L. 449, 30 A. (2d) 416), the Supreme Court reversed the State Board of Tax Appeals on both branches of the case. The major discussion was on the point of the nullity of the assessment proceedings and the inapplicability of the remedial statutes, on which point the Hillsborough Township had in its briefs pressed upon the Supreme Court, as it did later upon the Court of Errors and Appeals, all of the arguments and cases relied on in petitioners' brief in this Court. The point that the property was exempt was treated as a question of fact and determined summarily. The Court of Errors and Appeals, as above pointed out, affirmed "for the reasons expressed in the opinion delivered by Mr. Justice Bodine in the Supreme Court" (131 N.J.L. 275, 36 A. (2d) 201).

Because of the resulting importance of the reasoning of Mr. Justice Bodine, we quote somewhat extensively from

his opinion in the Supreme Court on the question of the invalidity of the assessment procedure, as follows (129 N.J.L., pp. 452-455, 30 A. (2d), pp. 418-420):

> "N.J.S.A. 54:3-20 provides a method for the inclusion of property omitted by the assessor and another method for the inclusion of property omitted from the assessment. Let us glance first at the procedure when property is omitted from the assessment. 'On the written complaint of the collector, or any taxpayer of the taxing district or of the governing body thereof, that property specified has been omitted in the assessment, the county board, on *five days'* notice in writing to the owner by the party complaining, and after *due examination and hearing*, may enter the omitted property on the duplicate by *judgment rendered within ten days* after the hearing. * * * *Such proceedings may be brought within one year from the date when taxes on real property become a lien.*' The italics supplied.*
>
> "There was no compliance whatever with the provisions of the law as we have seen. The notice was, in part, defective and there was no notice of the hearing when the question of the value of intangibles was determined, and no proceeding in a judicial manner as required by law. * * *
>
> "The defendants contend that their proceedings were proper because it was under the first part of N.J.S.A. 54:3-20, which reads as follows: 'The county board of taxation shall, by resolution, cause to be entered upon the tax duplicate a proper assessment against any property *omitted* by the assessor. The board shall then give immediate notice of such entry and of the time and place of its next meeting

*That is, supplied by Mr. Justice Bodine.

to the owner of the property affected, and furnish a copy of the entry to the clerk or collector of the taxing district, who shall enter it on his tax list." [Italics the Court's.]

"There is a vast difference between the inclusion of property omitted by the assessor and property omitted from the assessment.

"N.J.S.A. 54:4-55 provides: 'The county board of taxation shall, on or before April first in each year, cause the corrected, revised and completed duplicates, certified by it to be a true record of the taxes assessed, to be delivered to the collectors of the various taxing districts in the county, and the tax lists shall remain in the office of the board as a public record.' This limits action with respect to property omitted by the assessor to April 1, 1939.

* * * * * *

"The assessment was made on the complaint of an aggrieved taxpayer, and the procedural direction of the statute required a specific notice to the owner of the precise property claimed to be omitted from the assessment and a hearing upon notice and a deliberate judgment.

"The underlying question in the case is the proper construction of the statute N.J.S.A. 54:3-20 and a determination as to whether there is a difference in the phraseology 'property omitted by the assessor' and 'property omitted in the assessment'. Both phrases have occurred in our statutes since P.L. 1848, p. 230 was enacted. The first statute had two paragraphs. They were combined in substantially the present form in the Revision of 1903. If property in a taxing district is omitted by the assessor it must be added to the assessment before April 1st. Its addition decreases the amount of taxes to be raised since the ratables are thereby increased. The taxpayer is not embarrassed. He knows he will have a tax to pay and is liable anyway even if the property was not included in the assessment. However, if property is added to the assessment after the rate

> has been fixed it gives rise to a municipal windfall. There is no harm in this if there were due notice and a fair hearing by the county board and a judicial determination by it. The procedure adopted in this case was not in accordance with the statute. Property omitted by the assessor must be added before April 1st, so that the rate of taxation may be determined. Thereafter, the addition of property omitted from the assessment must be in accordance with the part of the statute first quoted. *Mitsch* v. *Riverside*, 86 N.J.L. 603, 92 A. 436; *Shillingsburg* v. *Greenwich*, 83 N.J.L. 129, 83 A. 644."

The words "omitted by the assessor" appearing in the first sentence of R.S.N.J. 54:3-20 thus have, as was held by Mr. Justice Bodine in the *Duke Power Company* case, a legislative meaning distinct from the words "omitted in the assessment" appearing in the third sentence of that section.

Under New Jersey Law there is no "assessment" until the work of the County Board of Taxation is finished and the corrected, revised and completed duplicates are delivered on or before April 1 by that Board to the collectors of the various taxing districts in the county. *Hohenstatt* v. *Bridgeton*, 62 N.J.L. 169, 40 Atl. 649 (Sup. Ct. 1898); *Town of Union* v. *Hudson County Board of Taxation*, 77 N.J.L. 178, 71 Atl. 46 (Sup. Ct. 1908); *Merchants etc. Fire Insurance Company* v. *Essex County Board of Taxation*, 16 N.J. Misc. 505, 192 Atl. 450 (Sup. Ct. 1937); and *Township of Middletown* v. *Ivins*, 102 N. J. L. 36, 130 Atl. 648 (Sup. Ct. 1925). In the *Ivins* case, *supra*, the Supreme Court said (102 N. J. L., p. 42, 130 Atl., p. 651) that:

> "the valuation or assessment made originally by the assessor, and returned to the county board of taxa-

tion, was not a completed assessment, and did not become such until acted upon by the county board, which does not render a judgment, but acts upon its own information and knowledge, and, after investigation, makes the changes necessary in order to perform its duty of seeing that property is taxed equally and at its true value."

Petitioners' argument, that the so-called remedial statutes R.S.N.J. 54:4-58 and 54:4-59 should have been held applicable to cure the illegality of the actions of the Somerset County Board of Taxation, is met by the following explicit passage in Mr. Justice Bodine's opinion in the *Duke Power Company* case (129 N. J. L., p. 457, 30 A. (2d), p. 420) as follows:

> "Since none of the property in question was liable to taxation in Hillsborough Township, we need not consider the application of the remedial statutes N.J.S.A. 54:4-58 to 54:4-60. However, the remedial statutes we do not find to have been a substitute for proper assessment. Their application has been only in instances where property has been omitted by the assessor or has been assessed in the name of one other than the true owner. *Musconetcong Iron Works* v. *Borough of Netcong*, 90 N. J.L. 58, 99 A. 914; *Manistee Iron Works* v. *Raritan*, 12 N.J. Misc. 143, 170 A. 39. But they do not apply where the statute for the addition of property omitted from the assessment is not complied with. *Mitsch* v. *Riverside*, 86 N.J.L. 603, 92 A. 436; *Shillingsburg* v. *Greenwich*, 83 N.J.L. 129, 83 A. 644."

Petitioners contend that this is mere dictum. But it is apparent that this characterization is completely erroneous. The conclusion that the remedial statutes were

inapplicable was absolutely essential to the holding that the assessment was null and void. And that holding was one of the two separate and coordinate grounds of the Court's determination of the case. As above stated, the Supreme Court and the Court of Errors and Appeals held both that the assessments were a nullity and that the property assessed was exempt. Either holding would have been sufficient to dispose of the case. But the decision was rested equally on both grounds. It is thus impossible to say that either ground was decision and the other dictum. That was expressly held by this Court in *United States* v. *Title Insurance & Trust Co.*, 265 U.S. 472, 486 (1924), as follows:

> "But it is urged that what we have described as ruled there was *obiter dictum* and should be disregarded, because the Court there gave a second ground for its decision which was broad enough to sustain it independently of the first ground. The premise of the contention is right but the conclusion is wrong; for where there are two grounds upon either of which an appellate court may rest its decision, and it adopts both, the ruling on neither is *obiter*, but each is the judgment of the court and of equal validity with the other." *Union Pacific R.R. Co.* v. *Mason City & Fort Dodge R.R. Co.*, 199 U. S. 160, 166; *Railroad Companies* v. *Schutte*, 103 U.S. 118, 143."

This Court's language that each ground of decision "is the judgment of the Court and of equal validity with the other" makes irrelevant petitioners' attempt (Br. pp. 38-39) to distinguish between obiter dictum and judicial dictum. For it makes plain that, in a case like this, the conclusion is a decision, and not dictum at all, either obiter or judicial. In the *Duke Power Company* case the concluding paragraph of Mr. Justice Bodine's opinion was:

> "Since the property assessed was not subject to taxation *and* since the procedure before the State Board was no substitute for a proper proceeding before the County Board the assessment is set aside and the judgment is reversed." (italics ours.)

The judgment of reversal was therefore based squarely on both of the two independent grounds: (1) the invalidity of the assessment under Section 54:3-20; and (2) the exemption of the property assessed. And to the holding on the first ground the decision of the inapplicability of the remedial statutes was an essential prerequisite.

As Goodrich, C.J., said in the Court below (149 F. (2d), p. 621; R. 155):

> "We see not the slightest reason for supposing that the court did not mean just what it said when it rested its decision on both points."

Petitioners argue at p. 34 of their brief that, accepting the view that the remedial statutes do not apply to property "omitted in the assessment", they should be applied to the assessments against respondent as Trustee of Duke Endowment since no assessment had ever previously been made against the Endowment and thus its property was property "omitted by the assessor".

This argument completely misconceives the true distinction between omission "by the assessor" and omission "in the assessment". As we have shown, property is "omitted by the assessor" within the meaning of the first sentence of R.S. 54:3-20 when overlooked by the taxing district in preparing its tax lists; but property is "omitted in the assessment" when it has not been listed by the assessor or added before April 1 by the County Board during the revision

period after receipt of the tax lists from the taxing districts. Once that date has passed without inclusion of an assessment against particular property, that property is "omitted in the assessment". Moreover, so far as concerns petitioners' argument on the assessment against respondent as Trustee of the Duke Endowment, the addition of a new taxpayer, without prior notice to him and without hearing, is more drastic and oppressive action than is adding to the assessed property of a taxpayer already on the rolls, and hence more within the reason of the statutory requirements embraced in the third sentence of Section 54:3-20.

Petitioners also argue (Br. p. 32) that respondent was given notice that the next regular meeting of the Somerset County Board of Taxation would be held on July 14, 1941 and that she did not attend the meeting, and neither requested nor was refused a hearing. But this notice was one made after the resolution of the County Board had already purported to add the property to the assessment duplicate and was admittedly pursuant to the procedure provided in the first two sentences of Section 54:3-20, which in contrast to the third sentence did not even purport to require a hearing, and which the *Duke Power Company* case held inapplicable. That a substantially identical notice was given to the Duke Power Company after this same County Board's identical action of November 22, 1940, appears from the following paragraphs of Mr. Justice Bodine's opinion (129 N.J.L., p. 452, 30 A. (2d), p. 418):

> "The prosecutor later received the following notice: 'Please take notice that the next meeting of Somerset County Board of Taxation will be held at the Court House in Somerville, New Jersey, at 10 A.M. on Monday, December 2d, 1940.'

> "In compliance therewith its counsel attended at the time specified and was told by the president of the Board: 'We didn't ask you to be here. We simply notified you that we would have our regular meeting to-day and the reason for that was that if you desired to examine the records of the Board of that meeting [of November 22d, 1940] it was your privilege to do it.'"

Mr. Pitney's affidavit in the instant case (R. 101) includes in its description of the proceedings before the County Board, recited by Mr. Justice Bodine in the above-quoted extract, the fact that the President of the Board also said:

> "We feel that the case is closed as far as we are concerned."

The affidavit shows (R. 100) that Mr. Pitney was present at that meeting, and so is a competent witness to what occurred therein. As petitioners phrase it in their brief (p. 32), "At the next meeting of the Tax Board the attorneys for the Duke Power Company appeared before the Board and were refused a hearing."

Plainly, if respondent in this case had attended the "next regular meeting of said Board" on July 14, 1941, she would have been similarly refused a hearing. But there was no obligation on respondent to attend before the County Board at all, since it was proceeding without authority of law and could take no action which would not be a sheer futility. As Mr. Justice Bodine said in the *Duke Power Company* case (129 N.J.L., pp. 454-455, 30 A. (2d), p. 419):

> "The County Board could not, on its own motion, make the assessment on November 22d, 1940, and then act as an appellate body on December 2d,

1940. It was not acting according to law at either time. It might just as well have taken the figures for the assessment out of a news report."

It is well settled that county boards of taxation are special statutory tribunals and may not act without express statutory authority or outside the time limits prescribed by the statutes defining their powers. *Acquackanonk Water Co.* v. *Passaic Board of Taxation*, 88 N.J.L. 555, 96 Atl. 481 (Sup. Ct. 1916); *N. J. Zinc Co.* v. *Sussex County Board of Equalization*, 70 N.J.L. 186, 56 Atl. 138 (Sup. Ct. 1903).

It is clear that the *Duke Power Company* case was the decision of the highest court of New Jersey on the very questions of New Jersey law on which the courts below decided this case, and on facts indistinguishable from those of this case. The action of the courts below in granting and affirming judgment herein in accordance with that decision was therefore manifestly correct.

CONCLUSION

THE JUDGMENT OF THE CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT SHOULD BE IN ALL RESPECTS AFFIRMED.

Respectfully submitted,

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THOMAS L. PERKINS
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On the Brief

December 7, 1945.

APPENDIX

Full text of all sections of the Revised Statutes of New Jersey cited in the foregoing brief.

TITLE 54. TAXATION.

SUBTITLE 1. DEPARTMENT AND BOARDS FOR THE REVIEW, ASSESSMENT AND COLLECTION OF TAXES.

Chapter 3. *County Boards of Taxation*

54:3-11. *County boards of taxation replace predecessors.* The county boards of taxation shall have all the powers formerly exercised by commissioners of appeal and local boards charged with the duty of reviewing taxes on appeal, under such rules as they may from time to time adopt, and shall perform all the duties formerly performed by county boards of equalization or other county boards charged with the review or equalization of tax assessments or tax lists, and all the duties formerly performed by the county boards of assessors.

54:3-20. *Assessment of omitted property.* The county board of taxation shall, by resolution, cause to be entered upon the tax duplicate a proper assessment against any property omitted by the assessor. The board shall then give immediate notice of such entry and of the time and place of its next meeting to the owner of the property affected, and furnish a copy of the entry to the clerk or collector of the taxing district, who shall enter it on his tax list. On the written complaint of the collector, or any taxpayer of the taxing district or of the governing body thereof, that property specified has been omitted in the assessment, the county board, on five days' notice in writing to the owner by the party complaining, and after due examination and hearing, may enter the omitted property on the duplicate by judgment rendered within ten days after the hearing, a transcript whereof shall be furnished by the board to the col-

lector, who shall amend his duplicate accordingly. The collector shall present such complaints and serve such notices as the governing body may direct and shall attend before the board and subpoena proper witnesses and pay their fees. He shall receive reimbursement therefor and two dollars for every day he shall attend for his services from the taxing district. Such proceedings may be brought within one year from the date when taxes on real property become a lien.

54:3-21. *Appeals by taxpayers; by taxing district; petition.* A taxpayer feeling aggrieved by the assessed valuation of his property, or feeling that he is discriminated against by the assessed valuation of other property in the county, or a taxing district which may feel discriminated against by the assessed valuation of property in the taxing district, or by the assessed valuation of property in another taxing district in the county, may on or before August fifteenth appeal to the county board of taxation by filing with it a petition of appeal. A copy thereof shall also be filed with the clerk or attorney of the taxing district, setting forth the cause of complaint, the nature and location of the assessed property and the relief sought. The petition shall be signed and sworn to by the petitioner or his agent, and shall be in such form and contain such further information as may be from time to time prescribed by rule of the board, for the better understanding and determination of the appeal.

54:3-22. *Hearing of appeals; witnesses.* The board shall thereupon make such order respecting the time and manner for hearing the appeal as it may deem just, and shall summarily hear and determine the appeal, and revise and correct the assessment in accordance with the true value of the taxable property. It may compel the attendance of witnesses, the production of books and papers before it, examine witnesses or cause witnesses to be examined under

oath before it, which oath may be administered by a member of the board.

Subtitle 2. Taxation of Real and Personal Property in General.

Chapter 4. *Assessment and collection of taxes*

54:4-1. *Property subject to tax; date of assessment.* All property, real and personal, within the jurisdiction of this state not expressly exempted from taxation or expressly excluded from the operation of this chapter shall be subject to taxation annually under this chapter at its true value, and shall be valued by the assessors of the respective taxing districts. Property omitted by the assessors may be assessed as hereinafter provided. All property shall be assessed to the owner thereof with reference to the amount owned on October first in each year, and the person so assessed for personal property shall be personally liable for the taxes thereon.

54:4-3.2. *Exemption of personal property outside state.* The personal property owned by citizens or corporations of this state, situate and being out of the state, upon which taxes shall have been actually assessed and paid within twelve months next before October first, being the day prescribed by law for commencing the assessment shall be exempt from taxation under this chapter.

54:4-12. *Assessor; duties; ascertain persons and property taxable.* The assessor shall annually ascertain by diligent inquiry and by the oath of persons to be assessed and others, according to the best of his ability and judgment, the names of all persons taxable in his district and the true value of all the personal property therein. Every inhabitant of the taxing district, and every owner of personal property located in the district, shall, on application of the assessor, forthwith render a true account of his name and

personal property, money, effects and credits, and the assessor shall set down in a list in proper columns the names, the value of the personal estate assessed to each one, including the amount of the collectible debts due to him except debts secured by mortgage on real estate in this state, the amount allowed by the assessor as a deduction from such value for debts due and owing by the taxpayer, and for exemptions, and the net value of personal property assessed to each person. The assessor shall also ascertain and enter in the list in the appropriate column opposite each name, any poll tax and any dog tax chargeable against such person.

54:4-23. *Duty of assessor; standard of value.* The assessor shall ascertain the names of the owners of all real property situate in his taxing district, and, after examination and inquiry, determine the full and fair value of each parcel of real property situate in the taxing district at such price as, in his judgment, it would sell for at a fair and bona fide sale by private contract on October first next preceding the date on which the assessor shall complete his assessments, as hereinafter required.

54:4-24. *Assessor's list; form and content.* The assessor shall make a list in tabular form of the names of the owners, and set down in proper columns opposite each name the description and area of each parcel sufficient to ascertain its location and extent and the value of each parcel as determined by him. Property held in trust shall be assessed in the name of one or more of the trustees as such, separately from his individual assessment. If the name of the owner of a parcel shall be unknown, it shall be so entered in the list of names, and where an owner is not known to reside in the taxing district the list shall describe him as nonresident.

54:4-35. *Period for assessing; assessor's duplicate.* The assessor shall begin the work of making assessments upon real and personal property on October first in each

year and shall complete the work by January tenth following, on which date he shall attend before the county board of taxation and file with the board his complete assessment list, and a true copy thereof, to be called the assessor's duplicate, properly made up and legibly written in ink, to be examined, revised and corrected by the board as hereinafter provided.

54:4-46. *Tax lists and duplicates revised by county board.* Upon the filing of the assessment lists and duplicates by the assessors with the county board of taxation, the board shall meet for the purpose of examining, revising and correcting the tax lists and duplicates. Any assessor shall attend before the board at such time and place as it may direct, and shall, under the direction and supervision of the board, make up and prepare corrected tax lists and duplicates.

54:4-47. *Revision and equalization; functions of county board.* The county board may adjourn from time to time in the discharge of its duties, and may, after investigation, revise, correct and equalize the assessed value of all property in the respective taxing districts, increase or decrease the assessed value of any property not truly valued, add to the lists and duplicates any property which has been omitted or overlooked, at its true value, and in general do everything necessary for the taxation of all property in the county equally and at its true value.

54:4-55. *Corrected duplicates returned to taxing districts; lists remain of record.* The county board of taxation shall, on or before April first in each year, cause the corrected, revised and completed duplicates, certified by it to be a true record of the taxes assessed, to be delivered to the collectors of the various taxing districts in the county, and the tax lists shall remain in the office of the board as a public record.

54:4-58. *Tax, assessment or water rate not set aside for irregularities or illegality.* No tax, assessment or water

rate imposed or levied in this state shall be set aside or reversed in any action, suit or proceeding for any irregularity or defect in form, or illegality in assessing, laying or levying any such tax, assessment or water rate, or in the proceeding for its collection if the person against whom or the property upon which it is assessed or laid is, in fact, liable to taxation, assessment or imposition of the water rate, in respect to the purposes for which the tax, assessment or rate is levied, assessed or laid.

54:4-59. *Court to amend and fix amount due.* The court in which any action, suit or proceeding is or shall be pending to review any such tax, assessment or water rate shall amend all irregularities, errors or defects, and may if necessary ascertain and determine the sum for which the person or property was legally liable and by order or decree fix the amount thereof. The sum so fixed shall be the amount of tax, assessment or water rate for which the person or property shall be liable.

Subtitle 4. Particular Taxes on Corporations and Others.

Part 4. Taxation of Railroad and Canal Companies.

Chapter 24. *Assessment, levy and disposition*

54:24-3. *"Average rate of taxation": computation; statements by local assessors.* The "average rate of taxation" shall be computed in the following manner: On or before April first in each year the assessor in every taxing district shall prepare and forward to the state tax commissioner a certificate, under his hand and seal, duly sworn to under oath, certifying to the commissioner the true value of all property, real and personal, located in his taxing district, other than the property of railroad and canal companies the taxation of which is provided for by this article, but including therein the assessed value of property of rail-

road and canal companies particularly described in subdivision II of section 54:22-1 of this title, and shall also certify and report the rate of taxation in the taxing district for that year. The aggregate value of all the property, real and personal, so certified, shall be deemed to be the aggregate value of the general property in the state. In each taxing district the amount obtained by multiplying the value of all the property in the taxing district by the rate of taxation therein shall be deemed to be the total taxes of the taxing district, and the aggregate of the total taxes so ascertained shall be deemed to be the aggregate taxes of the state. The "average rate of taxation" shall be computed and determined by the commissioner by dividing the aggregate taxes by the aggregate value of the general property in the state. The rate so arrived at and determined shall be entered upon the records of the state tax department and shall constitute the "average rate of taxation" for that year.

SUPREME COURT OF THE UNITED STATES.

No. 305.—October Term, 1945.

Township of Hillsborough, Somerset County, N. J., and Christopher G. Horner, Collector of Taxes of the Township of Hillsborough, Petitioners, *vs.* Doris Duke Cromwell, Individually and as Trustee of the Duke Endowment.	On Writ of Certiorari to the United States Circuit Court of Appeals for the Third Circuit.

[January 28, 1946.]

Mr. Justice Douglas delivered the opinion of the Court.

This action was brought by respondent under the Declaratory Judgment Act, Judicial Code, § 274(d), 28 U. S. C. § 400, to have declared null and void certain assessments on intangible personal property entered for the years 1940 and 1941 by the Collector of Hillsborough Township, Somerset County, New Jersey.[1] The jurisdiction of the federal court in New Jersey was invoked by reason of diversity of citizenship and the allegation that the taxing authorities had consistently, systematically and intentionally singled out respondent for discriminatory treatment in the assessment of taxes for which she was without remedy under the laws and decisions of New Jersey. It was prayed that the assessments be declared invalid as in contravention of the due process and equal protection clauses of the Fourteenth Amendment and of the provisions of applicable New Jersey statutes to which we will later refer. The District Court denied a motion to dismiss and gave judgment for respondent. 56 F. Supp. 41. The Circuit Court of Appeals affirmed. 149 F. 2d 617. The case is here on a petition for a writ of certiorari which we granted because the asserted

[1] The assessments call for tax payments of nearly $7,000,000 for each year as compared with the Township's budget of something like $97,000 annually. Prior to these assessments the net assessed valuation for taxation of all property assessed, both real and personal, in the township amounted to $3,117,863 for 1940 and $3,139,020 for 1941. The resulting tax rate was 3.12 per cent for 1940 and 3.10 per cent for 1941. The additional assessments against respondent apparently would have increased the valuation of the township tax ratables by $221,940,438 for each of the two tax years, though it would not have affected the tax rates for those years.

conflict of that decision with *Great Lakes Dredge & Dock Co. v. Huffman*, 319 U. S. 293, raised an important problem concerning the relationship between the federal courts and state taxing authorities.

Sec. 267 of the Judicial Code, 28 U. S. C. § 384, provides that suits in equity shall not be sustained in the federal courts "in any case where a plain, adequate, and complete remedy may be had at law." That principle has long been recognized as having "peculiar force" in cases where the federal courts were asked to enjoin the collection of a state tax. *Matthews v. Rodgers*, 284 U. S. 521, 525, and cases cited. "The scrupulous regard for the rightful independence of state governments which should at all times actuate the federal courts, and a proper reluctance to interfere by injunction with their fiscal operations, require that such relief should be denied in every case where the asserted federal right may be preserved without it." *Id.*, p. 525. Where the remedy at law is "plain, adequate, and complete", it is the one which must be pursued even for the protection of any federal right. That practice of the federal equity courts was given further recognition and sanction by Congress in the Johnson Act, 48 Stat. 775, as amended, 50 Stat. 738, § 24(1) of the Judicial Code, 28 U. S. C. § 41(1), which provides that "no district court shall have jurisdiction of any suit to enjoin, suspend, or restrain the assessment, levy, or collection of any tax imposed by or pursuant to the laws of any State where a plain, speedy, and efficient remedy may be had at law or in equity in the courts of such State." It was against that background that we held in *Great Lakes Dredge & Dock Co. v. Huffman, supra*, that the policy which led federal courts of equity to refrain from enjoining the collection of allegedly unlawful state taxes should likewise govern the exercise of their discretion in withholding relief under the Declaratory Judgments Act.

The Circuit Court of Appeals fully recognized the principle of the *Huffman* case, but concluded that the state procedure was not "speedy, efficient or adequate" to protect the federal right against discriminatory state taxation. It is around that conclusion that the first phase of this controversy turns.

The equal protection clause of the Fourteenth Amendment protects the individual from state action which selects him out for discriminatory treatment by subjecting him to taxes not imposed

on others of the same class. The right is the right to equal treatment. He may not complain if equality is achieved by increasing the same taxes of other members of the class to the level of his own. The constitutional requirement, however, is not satisfied if a State does not itself remove the discrimination, but imposes on him against whom the discrimination has been directed the burden of seeking an upward revision of the taxes of other members of the class. *Sioux City Bridge Co.* v. *Dakota County*, 260 U. S. 441, 445-447; *Iowa-Des Moines Nat'l Bank* v. *Bennett*, 284 U. S. 239, 247; *Cumberland Coal Co.* v. *Board of Revision*, 284 U. S. 23, 28-29. The courts of New Jersey in a long line of decisions[2] have held that a taxpayer who has been singled out for discriminatory taxation may not obtain equalization by reduction of his own assessment. His remedy is restricted to proceedings against other members of his class for the purpose of having their taxes increased. The rule was stated in *Royal Mfg. Co.* v. *Board of Equalization*, 76 N. J. L. 402, aff'd 78 N. J. L. 337, as follows: "... the county boards are required to secure taxation of all property at its true value; so that the fact that the property of A is assessed at its true value and the property of other taxpayers within the same district is assessed below its true value, affords A no ground for demanding a reduction of his valuation, though it does entitle him to apply for an increase in the valuation of the others." 76 N. J. L. pp. 404-405. On the basis of that rule it is plain that the state remedy is not adequate to protect respondent's rights under the federal Constitution.

It is argued, however, that in 1933 the New Jersey courts adopted a different rule when *Central R. Co.* v. *Thayer-Martin*, 112 N. J. L. 5, was decided by the Court of Errors and Appeals. In that case the court did entertain an objection that the particular tax assessment violated the rule of *Sioux City Bridge Co.* v. *Dakota County*, *supra*. It found that the complaining taxpayer had not shown that a discrimination within the meaning of our cases existed. So it is argued that as the highest court in New Jersey recognized the federal rule, the federal District Court should have remitted respondent to her remedy in the New Jersey courts. There is, however, a two-fold difficulty with that position.

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[2] State v. Randolph, 25 N. J. L. 427, 431; State v. Taylor, 35 N. J. L. 184, 189; State v. Koster, 38 N. J. L. 308; State v. Segoine, 53 N. J. L. 339, 340, aff'd 54 N. J. L. 212; Central R. Co. v. State Board, 74 N. J. L. 1; Royal Mfg. Co. v. Board of Equalization, 76 N. J. L 402, 78 N. J. L. 337; Pennsylvania Coal Co. v. Saddle River, 96 N. J. L. 40, 43.

In the first place, the same judge who wrote the opinion for the Court of Errors and Appeals in the *Thayer-Martin* case wrote the opinion for the Supreme Court of New Jersey a year later in *Lehigh Valley R. Co.* v. *State Board*, 12 N. J. Misc. 673. The taxpayer contended that the state board of tax appeals erred in refusing to admit evidence of discrimination. The argument was that the rule of *Sioux City Bridge Co.* v. *Dakota County*, *supra*, should be followed and the holding of *Royal Mfg. Co.* v. *Board of Equalization*, *supra*, should be disapproved. The Supreme Court of New Jersey declined to allow a writ of certiorari to review the judgments of the state board of tax appeals. It did not mention the *Thayer-Martin* case, but followed *Royal Mfg. Co.* v. *Board of Equalization*, *supra*, saying that the New Jersey law on the point was "settled and controlling." 12 N. J. Misc. p. 675. If, therefore, may well be true, as respondent says, that the court in the *Thayer-Martin* case simply decided that the point raised by the taxpayer was not supported by facts and found it unnecessary to consider whether, if systematic discrimination had been shown, New Jersey would have afforded an adequate remedy. In any event, there is such uncertainty concerning the New Jersey remedy as to make it speculative (*Wallace* v. *Hines*, 253 U. S. 66, 68) whether the State affords full protection to the federal rights. In the second place, the state board of tax appeals to which respondent might have appealed concededly has no right to pass on constitutional questions.[3] Its judgments may be reviewed by the New Jersey Supreme Court by certiorari. The allowance of that writ, however, is not a matter of right, but purely discretionary.[4] And the refusal of a writ of certiorari by the Supreme Court may not be judicially reviewed by the Court of Errors and Appeals.[5] Accordingly we conclude that there was such uncertainty surrounding the adequacy of the state remedy as to justify the District Court in retaining jurisdiction of the cause. While the charges of discrimination in the complaint were denied, the jurisdiction of the District Court is determined by the allegations of the bill (*Hart* v. *B. F. Keith Vaudeville Exchange*, 262 U. S. 271) which here were substantial.

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[3] Duke Power Co. v. Hillsborough Township, 20 N. J. Misc. 240, 243 (reversed on another point 129 N. J. L. 449); Schwartz v. Essex County Board, 129 N. J. L. 129, 132, aff'd 130 N. J. L. 177.

[4] Staubach v. Cities Service Oil Co., 130 N. J. L. 157.

[5] Post v. Anderson, 111 N. J. L. 303; Staubach v. Cities Service Oil Co., *supra*, note 4.

This brings us to the second phase of the controversy. Neither the District Court nor the Circuit Court of Appeals decided the case on federal grounds. They held in reliance on *Duke Power Co. v. State Board*, 129 N. J. L. 449, 131 N. J. L. 275, that the assessments were invalid under the New Jersey statutes. In that case, as in the present one, property "omitted in the assessment" was attempted to be assessed by the County Board against the taxpayer after April 1st of each of the tax years involved without notice and hearing.[6] The assessment was set aside as not being in conformity with the statute. And it was held that the remedial statutes,[7] designed to cure irregularities in assessing or levying taxes, "do not apply where the statute for the addition of property omitted from the assessment is not complied with." 129 N. J. L. p. 457.

Petitioner argues that it is clear from *Duke Power Co. v. State Board, supra*, that respondent had a remedy in the state tribunals for failure of petitioner to follow the procedure required by the New Jersey statutes and that the federal court should have required her to pursue it. We have held that where a federal constitutional question turns on the interpretation of local law and the local law is in doubt, the proper procedure is for the federal court to hold the case until a definite determination of the local

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[6] N. J. Rev. Stat. § 54:3-20 provides in part, "On the written complaint of the collector, or any taxpayer of the taxing district or of the governing body thereof, that property specified has been omitted in the assessment, the county board, on five days' notice in writing to the owner by the party complaining, and after due examination and hearing, may enter the omitted property on the duplicate by judgment rendered within ten days after the hearing, a transcript whereof shall be furnished by the board to the collector, who shall amend his duplicate accordingly."

A different procedure is provided by § 54:3-20 for inclusion of property "omitted by the assessor." For a discussion of the difference between the two types of assessments see Duke Power Co. v. State Board, *supra*, 129 N. J. L. pp. 452-455. At p. 455, the court said:

"If property in a taxing district is omitted by the assessor it must be added to the assessment before April 1st. Its addition decreases the amount of taxes to be raised since the ratables are thereby increased. The taxpayer is not embarrassed. He knows he will have a tax to pay and is liable anyway even if the property was not included in the assessment. However, if property is added to the assessment after the rate has been fixed it gives rise to a municipal windfall. There is no harm in this if there were due notice and a fair hearing by the County Board and a judicial determination by it."

[7] Sec. 54:4-58 provides:

"No tax, assessment or water rate imposed or levied in this state shall be set aside or reversed in any action, suit or proceeding for any irregularity or defect in form, or illegality in assessing, laying or levying any such tax, assessment or water rate, or in the proceeding for its collection

law can be made by the state courts. *Railroad Commission* v. *Pullman Co.*, 312 U. S. 496; *Chicago* v. *Fieldcrest Dairies*, 316 U. S. 168; *Spector Motor Co.* v. *McLaughlin*, 323 U. S. 101. The latter case involved a suit in which the constitutionality of a Connecticut tax was challenged. There was uncertainty concerning the meaning of the local law. Under one construction the constitutional issues would fall; and in any event a decision by the state courts would cause the constitutional issues to be formulated in an authoritative rather than a speculative way. But it was clear that there was available a state remedy to which the complainant could resort on the remand of the cause. In the present case it appears that respondent's opportunity to appeal to the State Board of Tax Appeals[8] had expired even before the District Court ruled on the motion to dismiss.[9] And it is not clear that today respondent has open any adequate remedy in the New Jersey courts for challenging the assessments on local law grounds.[10] Moreover, *Duke Power Co.* v. *State Board*, *supra*, decided shortly before the District Court rendered judgment,[11] gave an authori-

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if the person against whom or the property upon which it is assessed or laid is, in fact, liable to taxation, assessment or imposition of the water rate, in respect to the purposes for which the tax, assessment or rate is levied, assessed or laid."

Sec. 54:4-59 provides:

"The court in which any action, suit or proceeding is or shall be pending to review any such tax, assessment or water rate shall amend all irregularities, errors or defects, and may if necessary ascertain and determine the sum for which the person or property was legally liable and by order or decree fix the amount thereof. The sum so fixed shall be the amount of tax, assessment or water rate for which the person or property shall be liable."

The court in Duke Power Co. *v.* State Board, *supra*, 129 N. J. L. p. 457, stated that "the remedial statutes we do not find to have been a substitute for proper assessment. Their application has been only in instances where property has been omitted by the assessor or has been assessed in the name of one other than the true owner."

[8] Ninety days are allowed. State Board of Tax Appeals, Rule V(c), CCH. Corp. Tax Serv. par. 89-505. The resolutions of the County Board attempting to make the assessments were entered June 26, 1941.

[9] The present bill was filed in July, 1941, the answer in September, 1941, and the motion to dismiss in November, 1941. The order denying the motion to dismiss was made in August, 1942.

[10] It seems that under certain circumstances certiorari to the Supreme Court may be had in lieu of an appeal to the State Board of Tax Appeals. It was held in Schwartz *v.* Essex County Board, *supra*, note 3, that lack of jurisdiction of the county board or irregularity in its proceedings may be tested by certiorari. 130 N. J. L. p. 178. And see State *v.* Clothier, 30 N. J. L. 351. But as we have seen, note 4, *supra*, it is a discretionary writ.

[11] That case was decided by the Court of Errors and Appeals on March 9, 1944. The present case was decided by the District Court on July 14, 1944.

tative interpretation of the local law. Hence, the reason for holding the case in *Spector Motor Co.* v. *McLaughlin*, *supra*, and remitting the complainant to the state courts for determination of the local law question no longer was existent here.

It follows *a fortiori* that the bill should not have been dismissed. As stated in *Greene* v. *Louisville & I. R. Co.*, 244 U. S. 499, 520, "A remedy at law cannot be considered adequate, so as to prevent equitable relief, unless it covers the entire case made by the bill in equity." Though the availability of a state remedy on the local law question be assumed to exist, so much uncertainty surrounds the New Jersey remedy to protect the taxpayer's federal right that a refusal to dismiss the bill was a proper exercise of discretion. Thus however the case may be viewed, the exceptional circumstances which we have noted take it out of the general rule of *Great Lakes Dredge & Dock Co.* v. *Huffman*, *supra*. The District Court, therefore, properly proceeded to decide the case on the merits. That it placed its decision on local law grounds is not objectionable. For it is well-settled that where the federal court has jurisdiction, it may pass on the whole case and, agreeably with the desired practice decide it on local law questions, without reaching the constitutional issues. *Siler* v. *Louisville & N. R. Co.*, 213 U. S. 175, 191, 193; *Greene* v. *Louisville & I. R. Co.*, *supra*, p. 508; *Chicago Great W. R. Co.* v. *Kendall*, 266 U. S. 94, 97-98; *Risty* v. *Chicago R. I. & P. Ry. Co.*, 270 U. S. 378, 387; *Waggoner Estate* v. *Wichita County*, 273 U. S. 113, 116; *Hurn* v. *Oursler*, 289 U. S. 238, 243-248.

Petitioner makes an extended argument to the effect that *Duke Power Co.* v. *State Board*, *supra*, is not a controlling precedent on the local law question on which the decision below turned. On such questions we pay great deference to the views of the judges of those courts "who are familiar with the intricacies and trends of local law and practice." *Huddleston* v. *Dwyer*, 322 U. S. 232, 237. We are unable to say that the District Court and the Circuit Court of Appeals erred in applying to this case the rule of *Duke Power Co.* v. *State Board*, which involved closely analogous facts.

Affirmed.

Mr. Justice MURPHY and Mr. Justice JACKSON took no part in the consideration or decision of this case.